(8)

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Title: Burger King Corporation, Appellant
v.
John Rudzewicz

Docketed:
June 19, 1984

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for appellant: Perwin, Joel S.

Counsel for appellee: Oehmke, Thomas H.

Entry	Date	Note	Proceedings and Orders
1	Jun 19 1984	G	Statement as to jurisdiction filed.
3	Jul 10 1984		Order extending time to file response to jurisdictiona statement until August 20, 1984.
4	Aug 20 1984		Motion of appellee John Rudzewicz to affirm filed.
5	Aug 22 1984		DISTRIBUTED. September 24, 1984
6	Aug 24 1984	X	Reply brief of appellant Burger King Corp. filed.
7	Oct 1 1984		Further consideration of the question of jurisdiction POSTPONED to the hearing of the case on the merits.
			**********
8	Nov 2 1984		Joint appendix filed.
9	Nov 15 1984		Brief of appellant Burger King Corp. filed.
10	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 8, 1985. (2nd case)
11	Dec 6 1984		CIRCULATED.
12	Dec 15 1984	X	Brief of appellee John Rudzewicz filed.
13	Dec 31 1984	X	Reply brief of appellant Burger King Corp. filed.
14	Jan 8 1985		ARGUED.
15	Jan 8 1985		Record filed.
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83-2097

No.

In the Supreme Court of the United States

October Term, 1983

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING UNCONSTITUTIONAL, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT DUE-PROCESS CLAUSE, SECTION 48.193(1)(g) OF THE FLORIDA STATUTES, WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA.

LIST OF PARTIES

PURSUANT TO RULES 15 AND 28.1 OF THE RULES OF THE SUPREME COURT, THE APPELLANT CERTIFIES THAT THE PARTIES TO THIS APPEAL ARE APPELLEE JOHN RUDZEWICZ—DEFENDANT IN THE TRIAL COURT AND APPELLANT IN THE CIRCUIT COURT; AND APPELLANT BURGER KING CORPORATION—PLAINTIFF IN THE TRIAL COURT AND APPELLEE IN THE CIRCUIT COURT. BURGER KING CORPORATION IS A WHOLLY-OWNED SUBSIDIARY OF THE PILLSBURY COMPANY, WITH NO SUBSIDIARIES OR AFFILIATES.

PURSUANT TO RULE 28.4(c) OF THE RULES OF THE SUPREME COURT, THE APPELLANT HEREBY RECITES THAT 28 U.S.C. §2403(b) MAY BE APPLICABLE TO THIS CASE, AND THAT A COPY OF THIS JURISDICTIONAL STATEMENT HAS BEEN SERVED UPON THE ATTORNEY GENERAL OF THE STATE OF FLORIDA. TO THE APPELLANT'S KNOWLEDGE, NO COURT INVOLVED IN THE INSTANT ACTION HAS CERTIFIED TO THE FLORIDA ATTORNEY GENERAL THE FACT THAT THE CONSTITUTIONALITY OF A FLORIDA STATUTE IS DRAWN IN QUESTION.

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JURISDICTIONAL STATEMENT

Burger King Corporation, a Florida corporation, appeals from the decision of the United States Court of Appeals, Eleventh Circuit, entered on February 13, 1984, and rendered by denial of rehearing on March 22. It holds that §48.193(1)(g) of the FLORIDA STATUTES—conferring long-arm jurisdiction upon a non-resident who breaches a contract in Florida by failing to perform acts required by the contract to be performed in Florida—is unconstitutional as violative of the appellee's right of due process.

OPINION BELOW

The opinion of the circuit court is reported as *Burger King Corporation v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), and appears in the appendix at A1.[1] The district court's Findings of Fact and Conclusions of Law and Order Thereon appear at A23, the Final Judgment at A35; neither are reported.

JURISDICTION

This was an action growing out of a franchise relationship, and the district court's jurisdiction was invoked on the basis of diversity of citizenship under 28 U.S.C. §1332; as well as federal-question jurisdiction under the federal trademark laws, *see* 15 U.S.C. §1121 and 28 U.S.C. §1338 (R. 1).[2] The decision and opinion of the circuit court were

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1. The appellee's co-defendant at the trial, Brian MacShara, did not appeal the judgment of the district court, *see* A3 n.1, and is not a party to this proceeding.

2. "R." refers to the Record on Appeal in the circuit court. "Tr." refers to Volumes V-VII of the Record on Appeal—consisting of the separately-paginated transcript of the trial in this case. "X." refers to trial exhibits. The appellant has not requested that the clerk of the circuit court certify and transmit the record to this Court under Rule 13 of the Rules of the Supreme Court, but will do so should any of the factual allegations contained in this Jurisdictional Statement be controverted.

entered on February 13, 1984 (A1). A timely petition for rehearing and suggestion for rehearing en banc were entertained and denied on March 22 (A37). The circuit court's judgment issued May 7 (A39). The appellant's notice of appeal was filed in the circuit court on May 21, 1984 (A41), within 90 days of that court's denial of rehearing (A37). This appeal is being docketed in this Court within the same 90 days.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2). Pursuant to Rule 15.1(e)(iii) of the Rules of the Supreme Court, we do not deem it necessary in this paragraph to offer authority that the circuit court did indeed declare a provision of the FLORIDA STATUTES unconstitutional, and thus that this Court has jurisdiction under 28 U.S.C. §1254(2). We will do so in our Statement of the Case below.

CONSTITUTIONAL PROVISION AND FLORIDA STATUTE

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 48.193, FLA. STAT. (1983):

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> • • •
>
> (b) Commits a tortious act within this state.
>
> • • •

> (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.[3]

STATEMENT OF THE CASE

1. The Facts.

Except for a few omissions, the facts of this case are fairly presented in the majority and the dissenting opinions of the circuit court; where appropriate we will reference additional evidence in the Record on Appeal. Mr. Rudzewicz and his co-defendant, both Michigan residents, purchased a Burger King franchise to be operated in Michigan, in May of 1979. Burger King is incorporated and headquartered in Florida. All relevant documents were mailed to the franchises from Miami, and were returned to Burger King in Miami. The franchise agreements required the franchises to remit all rent, royalties, tax refunds and other designated fees to Burger King headquarters in Miami. The appellant's co-franchisee attended courses at Burger King University in Florida. In addition, the contracts called for the application of Florida substantive law.

All of the above facts are stated in the majority opinion, which also acknowledges that Mr. Rudzewicz is the "senior partner in a Michigan accounting firm . . . ." 724 F.2d at 1506 (A2). That firm employs 50 people, and in fact represents three Burger King franchises (Tr. 425, 479). Mr. Rudzewicz' job is to give financial advice to individuals; at the time of trial he was making over $170,000.00 a year, with a net worth of over $1,000,000.00 (Tr. 434-36). He was not solicited by Burger King for

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3. Burger King's complaint in this case was filed in May of 1981 (R. 1). Section 48.193(1), FLA. STAT. (1981) is identical to the present statute quoted above. The circuit court's opinion merely refers to "Fla. Stat. §48.193 (1)(g)" (A7 & n.7).

this venture—but by his prospective partner Brian MacShara (Tr. 476). The two sought Burger King's "approval for franchise" (Tr. 42)—and their application was "approved" (Tr. 45, 481). In no sense was Mr. Rudzewicz an unsophisticated consumer enticed or victimized by oppressive corporate practices.[4]

To the contrary, Mr. Rudzewicz knew or should have known that his subjection to the jurisdiction of a Flordia court was not in the least fortuitous. Burger King's affidavit (R. 183-87) established without contradiction that Burger King is a Florida corporation with its principal place of business, its national headquarters, and its business records and documents in Miami; that under the franchise and lease agreements with Burger King, Mr. Rudzewicz was obligated to pay Burger King all royalties, fees for a variety of services, taxes, and a monthly rental; that all royalties were required to be mailed to Burger King in Miami; that the lease agreement expressly provided that rental payments be made to Burger King in Miami (*see* X. 9 at 21 or R. 53); that payments by Mr. Rudzewicz for the purchase of materials and supplies from Burger King's Davmor division were required to be made to Burger King

4. The majority's opinion—while ostensibly restricted to the question of personal jurisdiction—contains a number of gratuitous observations about Burger King's business practices. We feel it inappropriate to address these observations here, but will do so if permitted to brief the case on the merits. We merely note our strenuous disagreement with the majority's assertions that Burger King "persuaded" the franchisees to acquire an existing store instead of building one (A4); that it "convinced" them to purchase equipment before the rental charge had been computed (id.); that the "undisputed and uncontradicted" evidence is that the franchisees' rent was computed in a manner identical to the computation for a new building (A5, n.4); and that Burger King's Michigan office was responsible for "all" consultation with the franchise (A5-6). These are all the statements of an advocate—not of an appellate court charged to view the evidence in the light most favorable to the factfinder's conclusions. If permitted to brief this case, we will cite the substantial contradictory evidence on each of these points.

in Miami; that payments to Burger King for taxes under the franchise and lease agreements were to be mailed to Burger King in Miami; that co-defendant Brian MacShara had attended the Burger King University operations course located in Miami; and that the franchise agreement itself declares that it was made and entered into in Miami (X. 8 at 1 or R. 17), and became valid when executed and accepted by Burger King in Miami (X. 8 at 11 or R. 27).

In addition, the preliminary agreement signed by Mr. Rudzewicz declares that it was "made and entered into at Miami, Dade County, Florida" (X.3 at 1 or R. 14). The lease agreement calls for the application of Florida substantive law, and in addition provides that in the event of arbitration, such arbitration will be held in Miami (X. 9 at 21 or R. 53). It also provides that all required notices must be sent to Miami (*id.*). Likewise, the franchise agreement "shall be governed and construed under and in accordance with the laws of the State of Florida" (X. 8 at 11 or R. 27).[5]

Burger King brought this action after the franchisees defaulted in their payments, but only after 16 months of attempting without success to reach accommodation (*see* X. 16 or R. 59; Tr. 74, 125-27, 131, 133, 141-42, 166, 395). The complaint expressly charged a breach of contract

5. Mr. Rudzewicz himself acknowledged that both the lease agreement and the franchise agreement were signed first by Mr. Rudzewicz and his co-franchisee in Michigan, and only then sent to Burger King in Miami, where they were signed and sent back to Michigan (Tr. 201-02). In addition, Burger King offered its own testimony that the franchise agreement was signed by Burger King in Miami only after it was signed by the franchisees in Michigan; that all royalties, rental payments, tax payments, and payments for ordered goods were required to be mailed to Burger King in Miami; and that it was Burger King's computer in Miami which determined all arrearages (Tr. 85-86, 161-62, 201, 314-15). Mr. Rudzewicz' appellate brief expressly acknowledged (p. 6) that the franchisees did in fact make payments to Burger King in Miami.

"within this district court" in the failure to make payments "at plaintiff's place of business in Miami, Dade County, Florida" (R. 2; *see* R. 5); but it also charged the tortious act of trademark infringement (R. 8-13)—alleged to cause Burger King economic harm (R. 12)—and in this connection it sought injunctive relief (R. 13). Of course, the complaint specified Burger King's principal location in Miami (R. 1)—the place of injury.[6]

The trial court found for Burger King on the contract claims (A31). It also made a specific finding that the franchisees' continued use of Burger King's tradenames and marks constituted infringement, and awarded the injunctive relief requested (A33). Before the appeal, however, Mr. Rudzewicz compromised and waived his right of appeal on this claim, specifically conceding his improper use of Burger King's tradenames and marks (R. 804). This was part of a comprehensive settlement agreement under which the franchisees gave up possession of the store. Thus, none of the infringement claims, or the jurisdictional bases for their consideration, were before the circuit court on appeal.

2. The Federal Question.

Early in the proceedings, Mr. Rudzewicz filed a motion for summary judgment or dismissal, raising the question of personal jurisdiction under the Florida long-arm statute (A43, R. 123-24). Regarding jurisdiction, the motion said nothing about Burger King's charge of tortious conduct in the form of trademark infringement, or about §48.193(1)(b) of the FLORIDA STATUTES or 15 U.S.C. §1116. There fol-

6. As we have noted, §48.193(1)(b), FLA. STAT., confers long-arm jurisdiction over a non-resident who commits a tortious act in Florida. Moreover, 15 U.S.C. §1116—governing injunctions issued to prevent a trademark violation—allows nationwide service of process in that respect.

lowed memoranda and affidavits on both sides (R. 121-22, 126-27, 130-31, 132-36, 141-42, 143-44, 154-87). The trial court eventually denied the motion, citing five unreported federal and state trial-level decisions involving Burger King in which the identical jurisdictional argument about the contract claims had been rejected (A21, R. 201-02). Copies of these decisions are found at R. 171-82. Mr. Rudzewicz raised the issue again in his appellant's brief in the circuit court, and it was the sole basis for the circuit court's reversal of the judgment below. He raised no contention that the trial court lacked jurisdiction over the infringement claims.

3. The Decision Below.

On appeal, the majority panel focused on the difficult question of whether or not it was unfair or surprising to subject Mr. Rudzewicz to the jurisdiction of the Florida court under the circumstances of this case. The majority opinion says absolutely nothing about Burger King's trademark claims, or about their invocation of jurisdiction under either §48.193(1)(b), FLA. STAT., or federal law. Instead, the opinion treats only the contract claims, concluding that nothing in the course of negotiations regarding this franchise agreement gave Mr. Rudzewicz any reason to anticipate the prospect of a suit outside of Michigan; that the negotiations took place in Michigan and the franchise was located in Michigan; that the operation of the business itself required no performance in Florida; that many services were provided the franchisees by Burger King's local Michigan district office; that the necessity of litigating in Florida would be financially and tactically harmful to Mr. Rudzewicz; that he lacked sufficient bargaining power to extract some compensation for the prospect of such litigation out of state; that the contract's application of Florida substantive law was not sufficient to

provide notice of the potential for litigation in Florida; and that the co-franchisee's attendance at Burger King University in Florida cannot be attributed to Mr. Rudzewicz because he and his co-franchisee did not have a formal partnership relationship.

As a predicate for this conclusion, the majority opinion expressly acknowledges Mr. Rudzewicz' concession that his activities in this case "fall within the reach of the Florida long-arm statute, Fla. Stat. §48.193(1)(g)" (A7). Nevertheless, the majority opinion holds that enforcement of the statute violated Mr. Rudzewicz' right to procedural due process, because "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process (A18)." In this light, the panel decision in this case necessarily declared the Florida statute to be unconstitutional—at least as applied. As the court noted in *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974):

> The case *sub judice* illustrates the difference between deciding that the Texas Long-arm Statute will by its own terms reach far enough to cover a non-resident defendant and determining whether the statutory stretch may be hamstrung by federal constitutional limitations. We think it is beyond serious dispute that [the defendant] was within the literal grasp of [the statute]. . . . Thus the district court had jurisdiction over the person of [the defendant] if the operation of the statute would not offend traditional constitutional requirements.

Likewise in this case, it is beyond serious dispute that Mr. Rudzewicz' conduct fell within the literal grasp of the statute. This is not a case in which the statute either was construed below, or can be construed, to avoid the perceived constitutional infirmity. The Florida long-arm statute contains no instruction that it be construed in accordance with constitutional limitations.[7] Of course, this Court has held repeatedly that statutes should be construed if possible to avoid constitutional infirmities; but "those cases say nothing about whether a particular enactment is coextensive with the constitutional limits."[8] In Florida, the rule is that jurisdictional statutes must be strictly construed according to their plain language.[9]

Of course, where a particular long-arm statute is ambiguous—for example a typical "doing business" statute—even the Florida courts would construe the statute mindful of constitutional requirements.[10] But at the very least, any attempt to attribute constitutional strictures to a statute must be informed by its plain language—and the plain language of this statute creates long-arm jurisdiction *whenever* a non-resident fails "to perform acts required by the contract to be performed in this state."[11]

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7. Compare the state statutes at issue in *Calder v. Jones*, ____ U.S. ____, ____ S. Ct. ____ (1984) (52 LW 4349, 4350 n.5), *Kaulko v. Superior Court of California in and for the City and County of San Francisco*, 436 U.S. 84, 90 n.4 (1978), and *May v. Anderson*, 345 U.S. 528 (1953).

8. *Spencer Boat Co., Inc. v. Liutermoza*, 498 F.2d 332, 333 n.2 (5th Cir. 1974).

9. *See William E. Strasser Construction Corp. v. Linn*, 97 So.2d 458, 459 (Fla. 1957); *Esberger v. First Florida Business Consultants, Inc.*, 338 So.2d 561, 562 (Fla. 2nd DCA 1976); *Lyster v. Round*, 276 So.2d 186, 188 (Fla. 1st DCA), cert. denied, 283 So.2d 105 (Fla. 1973). *See also Spencer Boat Co., Inc. v. Liutermoza*, 498 F.2d 332, 333 (5th Cir. 1974) (Florida law). Compare the case-law governing the state statute at issue in *Keeton v. Hustler Magazine, Inc.*, ____ U.S. ____, ____ S. Ct. ____ (52 LW 4346, 4347 & n.4).

10. *See Flying Saucers, Inc. v. Moody*, 421 F.2d 884, 887 (5th Cir.), cert. denied, 398 U.S. 904 (1970); *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135, 137 (5th Cir.), cert. denied, 379 U.S. 915 (1964). *Cf. Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1212 (5th Cir. 1975).

11. If this were not the case—if every jurisdictional statute were held irrespective of its language to embrace an implicit

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Thus, confronted with the argument that §48.193(1)(g) should be construed to include a requirement of "other minimum contacts," one Florida court responded: "A reading of the statute to require the doing of more than one of the enumerated acts, even for the limited purpose of avoiding a perceived constitutional problem, would be strained."[12] The same court continued, *id.* at 114:

> Florida courts have jurisdiction over the parties and subject matter in a suit brought by a resident plaintiff against a nonresident defendant for failure of defendant to perform acts required by the contract to be performed in this state, provided only that the nonresident defendant has been properly served. . . .
>
> Where jurisdiction over the party is satisfied pursuant to Section 48.193(1)(g), the court need not determine whether the defendant also operates, conducts, engages in, or carries on a business in the state pursuant to Section 48.193(1)(a), Florida Statute (1979). [Citations omitted]. The statute plainly states that by doing any one of the acts enumerated, a nonresident person submits to the jurisdiction of the courts of this state for a cause of action arising from the doing of one of those acts.

Engineered Storage involved the failure of a defendant to make payments of money due in Florida. At least three other Florida cases expressly state that the failure of a non-resident to pay money due in Florida under a

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constitutional qualifier—then no jurisdictional statute could ever be declared unconstitutional, and no direct appeal would ever lie from any decision that the forum court lacked personal jurisdiction. That is clearly not the case, because jurisdictional statutes must be held to mean what they say.

12. *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 n.3 (Fla. 3rd DCA 1982).

contract—with no other contacts with Florida—is alone "sufficient" under §48.193(1)(g) to confer long-arm jurisdiction under the statute.[13] And four others enforce the statute under identical circumstances—implicitly affirming the statutory sufficiency of this single contact.[14] Thus, given the plain language of the statute, its consistent interpretation by the Florida courts, and the parties' agreement that the requisites for Florida long-arm jurisdiction were satisfied in this case, there can be no question that the only issue decided by the circuit court was whether or not the statute as applied was constitutional.

Of course 28 U.S.C. §1254(2) creates a right of direct appeal by any party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution.[15] This is true whether the statute is declared invalid on its face, or as applied.[16] And §1254(2) creates

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13. *Thompson v. King*, 523 F. Supp. 180, 184 (M.D. Fla. 1981) (Florida law); *Wilks v. Swift and Co.*, 382 So.2d 1364 (Fla. 1st DCA 1980); *Professional Patient Transportation, Inc. v. Fink*, 365 So.2d 209, 210 (Fla. 3rd DCA 1978).

14. *Chen v. Watter*, 421 So.2d 771, 772 (Fla. 4th DCA 1982) (per curiam); *Carroll Associates, Inc. v. Video Applications, Inc.*, 421 So.2d 3 (Fla. 5th DCA 1982) (per curiam); *Guritz v. American Motivate, Inc.*, 386 So.2d 60, 61-62 (Fla. 2nd DCA 1980); *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082, 1084 (Fla. 2nd DCA 1977). *But see Scordilis v. Drobnicki*, 443 So.2d 411, 412-14 (Fla. 4th DCA 1984); *Osborn v. University Society, Inc.*, 378 So.2d 873, 874 (Fla. 2nd DCA 1979).

15. *See generally United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962) (per curiam); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 491-92 (1958).

16. *New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976) (per curiam); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (separate opinion announcing judgment). Also instructive on this point are cases decided under 28 U.S.C. §1252—creating a right of appeal from decisions invalidating federal statutes. *See United States v. Darusmont*, 449 U.S. 292, 293 (1981) (per curiam); *United States v. Clark*, 445 U.S. 23, 25 n.2 (1980); *McLucas v. De Champlain*, 421 U.S. 21, 30-31 (1975); *United States v. American Friends Service Committee*, 419 U.S. 7, 9 n.4 (1974); *Fleming*

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a right of appeal even if the circuit court's opinion does not expressly declare a state statute unconstitutional, so long as such a conclusion is inherent in the circuit court's holding. As this Court has stated regarding analogous appeals from decisions invalidating federal statutes under 28 U.S.C. §1252: "Finally, §1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that the statutory provision was unconstitutional 'was a necessary predicate to the relief' that the lower court granted."[17] In this case there can be no question that such a conclusion is inherent in the relief of dismissal granted by the circuit court.

In dissent, Judge Johnson disagreed strongly with that conclusion. In reliance upon *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921 (5th Cir. 1981) (per curiam), the dissent argued that it is not unfair to subject Mr. Rudzewicz to jurisdiction in Florida, because he deliberately availed himself of the benefits of the forum by signing a contract calling for the application of Florida law. Under such circumstances, Florida has an interest in exercising such jurisdiction, and Mr. Rudzewicz is no less inconvenienced by the necessity of litigating in Florida than is Burger King inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. Finally, the dissenting opinion notes that Mr. Rudzewicz is senior partner of a Michigan ac-

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v. Rhodes, 331 U.S. 100, 102-03 (1947); *Cf. United States v. Raines*, 362 U.S. 17, 20 (1960) (dictum). *See also United States v. Knox*, 396 U.S. 77, 79 n.2 (1969) (decided under 18 U.S.C. §3731—dealing with decisions declaring criminal statutes invalid).

17. *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982), *citing United States v. Clark*, 445 U.S. 23, 26 n.2 (1980). *Compare United States v. Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 563-66 (1972) (per curiam).

counting firm, and that he personally negotiated these contracts obligating payments in excess of $1,000,000.00—which is inconsistent with any claim that he was victimized by boilerplate contractual language forced upon him: "He therefore had reasonable notice of the possibility that he would be sued under the contracts in the State of Florida, and he should have been adequately prepared for that contingency" (A20).

THE QUESTION IS SUBSTANTIAL

It would be impossible and inappropriate to undertake in this Jurisdictional Statement a comprehensive treatment of the issue and the cases addressing it. Instead, we hope to emphasize here the far-reaching impact of the circuit court's opinion; note the substantial inter-circuit and intra-circuit conflict which it reflects; and at least sketch the compelling substantive argument which we hope to advance.

By our count, there are at least 30 states whose rules or statutes currently permit the exercise of long-arm jurisdiction under circumstances analogous to those here.[18]

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18. *See* Rule 4.2(2)(B) and (I), Alabama R. Civ. P. (contracting to supply services or goods in Alabama; any other fair and reasonable minimum contact); ALASKA STAT. §09.05.015(5) (1983) (promises to deliver anything of value to Alaska; the shipment of goods from Alaska, or the receipt of goods in Alaska); Rule 4(e)(1), Arizona R. Civ. P. (any person causing an event to occur in Arizona out of which a claim arises); DEL. CODE ANN. tit.10, §3104 (1975) (contract to supply services or things in Delaware); IOWA CODE ANN. §617.3 (West Supp. 1982) (making a contract in Iowa to be performed in whole or part in Iowa); KANSAS STAT. ANN. §60-308(b)(5) (1983) (express or implied contract, by mail or otherwise, with a resident of Kansas, to be performed in whole or in part by either party in Kansas); KY. REV. STAT. §454.210(2)(a)(2) (Baldwin 1979) (contracting to supply services or goods in Kentucky); LA. REV. STAT. ANN. §13:3201(b) (West 1968) (contracting to supply services or things in Louisiana); ME. REV. STAT. ANN. tit.14, §704-A (1980) (contracting to supply services or things in Maine);

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In addition, almost every state has a "doing business" statute—and there are numerous state decisions holding that the contractual obligation to make payment in the forum

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MD. CTS. JUD. PROC. CODE ANN. §6-103(b) (1974) (contracting to supply goods or things in Maryland); MASS. GEN. LAWS ANN. ch.223A, §3(b) (West 1958; Supp. 1983) (contracting to supply services or things in Massachusetts); MICH. COMP. LAWS §600.705(5) (1975) (contracting for services or materials in Michigan); MISS. CODE 1972 tit.13, §13-3-57(1) (Supp. 1983) (contract to be performed in whole or part by either party in Mississippi); MO. REV. STAT. §506.500.1(2) (1967) (making of any contract within Missouri); Rule 4B(1)(e), Montana R. Civ. P. (contract for services or materials furnished in Montana); NEB. REV. STAT. §25-536(b) (1979) (contracting to supply services or things in Nebraska); N.Y. CIV. PRAC. LAW §302(a)(1) (McKinney 1982) (contracting to supply goods or services in New York); N.C. GEN. STAT. §1-75.4(5) (1983) (contract to deliver or receive things of value in North Carolina); Rule 4(b)(2)(B), North Dakota R. Civ. P. (contract to supply goods or other things in North Dakota); OHIO REV. CODE ANN. §2307.38.2(A)(2) (Page 1981) (contracting to supply services or goods in Ohio); OKLA. STAT. ANN. tit.12, §1701.3 (West 1980) (contract to supply services or things in Oklahoma); Rule 4E.(1), Oregon R. Civ. P. (promise to make payment for services performed in Oregon); PA. CONS. STAT. ANN. tit.42, §5322 (Purdon 1981; Supp. 1983) (contracting to supply services or things; causing harm by act or omission outside Pennsylvania); S.C. CODE ANN. §36-2-803 (1)(g) (Law. Co-op. 1977) (contract to be performed in whole or in part in South Carolina); S.D. CODIFIED LAWS ANN. §47-8-17 (1983) (contract to be performed in whole or in part by either party in South Dakota); TENN. CODE ANN. §20-2-214(5) (1980) (contract for services or materials); TEX. REV. CIV. STAT. ANN. art.2031b(4) (Vernon 1964) (doing business, defined as entering into a contract by mail or otherwise, to be performed in whole or in part by either party in Texas); UTAH CODE ANN. §28-27-24(2) (1977) (contracting to supply services or goods); VA. CODE §8.01-328.1(2) (Supp. 1983) (contracting to supply services or things); W.VA. CODE §56-3-33(a)(2) (Supp. 1983) (contracting to supply services or things); WIS. STAT. ANN. §801.05 (West 1977) (promise to deliver things of value in Wisconsin).

We recognize that many of these statutes confer jurisdiction on parties obligated to ship goods or things into the forum jurisdiction—but not, as here, to pay money or otherwise perform a contract. We cite these statutes because it seems to us that the circuit court's reasoning in this case would invalidate them as well. After all, Mr. Rudzewicz was not simply a passive con-

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state is a form of doing business under such statutes.[19] And as we will note below, a clear majority of federal decisions uphold such applications of "doing business" statutes as consistent with constitutional requirements.

Thus, the circuit court's decision in this case affects far more than just a single Florida statute. It implicates at least 10 states—and as many as 31—with comparable statutes. It implicates the "doing business" legislation of almost every state. It does so on a subject about which this Court has not definitively spoken. And it does so in the context of a national trend toward the franchising of retail service establishments. This case may determine whether every franchisor must litigate not under a coherent set of state laws enforced in a single jurisdiction—but wherever a disputatious franchisee may reside.

It would serve no useful purpose to canvass here the seminal decisions of this Court on the issue of personal ju-

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sumer whose business was solicited in this case; he was the active party in an arms-length commercial transaction. That was not enough for the circuit court in this case, and thus its reasoning might well invalidate statutes conferring jurisdiction over parties obligated to send goods or services, rather than money, into the forum state. In any event, even apart from these statutes, we have cited nine other statutes which are precisely analogous to the Florida statute overturned in this case.

19. *See, e.g., Mouzavires v. Baxter*, 434 A.2d 988 (D.C. App. 1981), *cert. denied*, 455 U.S. 1006 (1982); *First Wyoming Bank v. Trans. Mt. Sales & Leasing, Inc.*, 602 P.2d 1219 (Wyo. 1979); *Bard Bldg. Supply Co., Inc. v. United Foam Corp.*, 137 Vt. 125, 400 A.2d 1023 (1979); *International Merchandising Associates, Inc. v. Lighting Systems, Inc.*, 20 Ill. Dec. 838, 64 Ill. App.3d 346, 380 N.E.2d 1047 (1978); *Manufacturers' Lease Plans, Inc. v. Alverson Draughon College*, 115 Ariz. 358, 565 P.2d 864 (1977); *Mitchim v. Mitchim*, 518 S.W.2d 362 (Tex. Supp. 1975); *A. F. Briggs Co. v. Starrett Corp.*, 329 A.2d 177 (Me. 1974); *Proctor & Schwartz, Inc. v. Cleveland Lumber Co.*, 228 Pa. Super. 12, 19-20, 323 A.2d 11, 15 (1974); *Cook Associates, Inc. v. Colonial Broach & Machine Corp.*, 14 Ill. App.3d 965, 970, 304 N.E.2d 27, 31 (1973); *Uvalde Rock Asphalt Co. v. Consolidated Carpet Corp.*, 457 S.W.2d 649 (Tex. Civ. App. Beaumount 1970).

risdiction.[20] These cases establish the parameters for our inquiry, but they provide few answers "in black and white. The greys are dominant and even among them the shades are innumerable."[21] Each case must rest on its own facts, revealing the presence or absence of sufficient "affiliating circumstances" to confer jurisdiction.[22] We merely note here that the question is whether Mr. Rudzewicz had sufficient minimum contacts with Florida such that the maintenance of this suit would not offend traditional notions of fair play and substantial justice.[23] The answer depends on whether the "quality and nature" of Mr. Rudzewicz' activity were such that it was "reasonable" and "fair" to require him to defend this action in Florida.[24]

As we see it, the circuit court struck the balance against the exercise of jurisdiction primarily because Mr. Rudzewicz both contracted and partially performed his contract with Burger King by telephone and by mail—but never set foot on Florida soil. Although his co-franchisee did attend training courses in Florida, at most Mr. Rudzewicz promised that he *would* travel to Florida under this agreement, if arbitration were necessary (X. 9 at 21 or R. 53).

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20. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kaulko v. Superior Court of California*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

21. *Estin v. Estin*, 334 U.S. 541, 545 (1948), cited in *Kaulko v. California Superior Court*, 436 U.S. 84, 92 (1978).

22. *Hanson v. Denckla*, 357 U.S. 235, 2[illegible] (1958).

23. *See Kaulko v. California Superior Court, supra*, 436 U.S. at 98; *International Shoe Co. v. Washington, supra*, 326 U.S. at 316, citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

24. *Kaulko v. California Superior Court, supra*, 436 U.S. at 92, citing *International Shoe Co. v. Washington, supra*, 326 U.S. at 316-17; *Shaffer v. Heitner, supra*, 433 U.S. at 207-12; *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445 (1952).

And yet as early as 1949, though in a different context, this Court held that the Constitution may permit the exercise of long-arm jurisdiction despite the absence of any physical contact with the forum.[25] Thus for example in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), this Court permitted California's exercise of long-arm jurisdiction over a Texas insurer which had assumed a risk centered in California. And in a variety of contexts analogous to this case, the circuit courts have emphasized that in proper cases, the forum may exercise jurisdiction over a non-resident defendant who has never been physically present in that forum.[26]

The real question is not whether Mr. Rudzewicz visited Florida, but whether the totality of his relationship with Burger King made it fair and reasonable to impose upon him the requirement of making his first trip to Florida to defend this action. That question will occupy any subsequent brief on the merits. Our object here is to provide a thumbnail sketch of the argument, demonstrating the substantial authority for our position.

First, a significant number of cases support the exercise of jurisdiction under state statutes analogous to this

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25. *Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission*, 339 U.S. 643 (1949).

26. *See, e.g., Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 937 (10th Cir. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 495-98 (5th Cir. 1974); *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1175 (7th Cir. 1971); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 382 (6th Cir. 1968). If that were not the case, then Burger King might avoid this entire problem by simply requiring all prospective franchisees to come to Florida to negotiate and close on their contracts—to pay for transportation and lodging and legal counsel as the cost of their accession to the laws of Florida.

one.[27] *In Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003 (5th Cir. 1982), for example, the representative of a Mississippi trucking firm had contacted a California freight broker while in California, and there made an oral agreement to supply trucks to move goods for the California company on an open account basis. The orders were telephoned to Mississippi, with payments due to Mississippi, but none of the trucks shipped to California originated in Mississippi, although some passed through the state on their way. The Mississippi statute confers jurisdiction over anyone making a contract with a Mississippi resident to be performed in whole or part by any party in Mississippi. Though the California company had no physical contact with Mississippi, the court upheld the exercise of its long-arm jurisdiction on the basis of the telephone calls and payments made to Mississippi. We commend to the Court the compelling language of this opinion, which we lack the space to quote.

We also lack the space to summarize the facts of the other cases cited in footnote 27. We especially note the tenth circuit's opinion in *Continental American* and the fifth circuit's opinion in *Marathon Metallic*—both cases strikingly analogous to this one—both opinions compelling.

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27. *See, e.g., Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062 (4th Cir. 1982); *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309 (10th Cir. 1982); *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003 (5th Cir. 1982); *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921 (5th Cir. 1981) (per curiam); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933 (10th Cir. 1977); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969); *Thompson v. King*, 523 F. Supp. 180 (M.D. Fla. 1981) (upholding this particular statute); *Federal National Bank & Trust Co. of Shawnee v. Moon*, 412 F. Supp. 644 (W.D. Okla. 1976); *First National Bank of Kansas City v. Ward*, 380 F. Supp. 782 (W.D. Mo. 1974); *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F. Supp. 977, 979 (N.D. Tex. 1971).

Second, we invoke a substantial number of cases in which "doing business" statutes were applied under facts analogous to those here.[28] For example, in *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974), a Texas company (Product Promotions) contracted by mail with a French corporation (CEMA) for the testing of Product Promotions' product in France and Monaco. The contract was made in Texas because it was signed last by Product Promotions in Texas; and the test results were shipped by CEMA to Texas in two mailings. Those were the only two contacts between CEMA and Texas, but the court held them sufficient to subject CEMA to Texas long-arm jurisdiction.

We commend to the Court the discussion at pages 495-98. With almost no modification, that language can be applied to this case. No less in this case, the contract with Mr. Rudzewicz was governed by the law of the forum, not only because it said so, because it was signed last by Burger King in Florida. No less in this case, payment by Mr. Rudzewicz to Florida was an "essential portion"

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28. *See, e.g., Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980) (per curiam); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971); *Erie Press Systems, A Division of EFCO, Inc. v. Shultz Steel Co.*, 548 F. Supp. 1215, 1218-21 (W.D. Pa. 1982); *Vena v. Western General Agency, Inc.*, 543 F. Supp. 779, 784 (N.D. Ill. 1982); *Snyder v. Hampton Industries, Inc.*, 521 F. Supp. 130, 146-57 (D. Md. 1981); *Commercial Discount Corp. v. King*, 515 F. Supp. 988, 992 (N.D. Ill. 1981); *Jadair, Inc. v. Van Lott, Inc.*, 512 F. Supp. 1141 (E.D. Wisc. 1981); *Cross v. Del Webb's Hotels, Inc.*, 482 F. Supp. 664 (E.D. Tex. 1979); *Standard Life & Accident Ins. Co. v. Western Finance*, 436 F. Supp. 843 (W.D. Okla. 1977); *Third National Bank in Nashville v. Hardi-Gardens Supply of Illinois*, 380 F. Supp. 930, 936-37 (M.D. Tenn. 1974). *Cf. Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

of his performance under the contract. No less in this case, Mr. Rudzewicz' breach of the contract had "reasonably foreseeable consequences within the State." No less in this case, his "contacts with the forum were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws were reasonably foreseeable, if not foreseen, rather than a surprise." No less in this case, the "cause of action for breach of contract arose out of a transaction between the parties that was consummated [in Florida]." No less in this case, Mr. Rudzewicz "entered a contract that required some performance in [Florida]; that [he] did not contemplate breaching [his] own contractual obligations does not make it unreasonable to foresee that those obligations might be tested in [Florida]." No less in this case, since the contract was made in Florida, Mr. Rudzewicz had "reason to foresee that enforcement and protection of [his] own rights under the contract might depend on the laws of [Florida]." No less in this case did Mr. Rudzewicz voluntarily enter "a transaction with one [he] knew to be a [Florida] resident, a transaction which had a substantial connection with [Florida] and which [he] knew could have consequences in [Florida]." No less in this case does Florida have a "legitimate and reasonable interest in providing a forum for this suit," because the "plaintiff is a [Florida] resident, the contract was made in [Florida], and [Florida] law will surely be of some relevance in resolving the suit." It would be virtually impossible to reconcile this decision with the circuit court's decision in this case. We invoke as well the decisions in *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (7th Cir. 1971), and *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149 (5th Cir. 1980) (per curiam), as well as the other cases cited in footnote 28.

On the basis of these authorities, it is possible to derive a list of Mr. Rudzewicz' contacts with Florida which demonstrates the propriety of the trial court's exercise of jurisdiction. It would be inappropriate here to undertake a comprehensive treatment of each factor in all of its nuances, but we can at least provide a sketch of the balance we hope to strike if permitted to brief the case on the merits.

1. The choice of the Florida forum was not fortuitous, given Burger King's substantial contacts with Florida—its headquarters, its record-keeping, its principal offices. This Court has held that the unilateral activity of the plaintiff in the forum state is not alone sufficient to confer jurisdiction,[29] but more-recently has said this: "The plaintiff's lack of 'contacts' will not defeat otherwise proper jurisdiction . . . but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises."[30] Because of Burger King's location in Florida, it was neither fortuitous nor unexpected that Mr. Rudzewicz' breach of his contract would result in a lawsuit in Florida.

2. Because the contracts in question require the application of Florida law, Mr. Rudzewicz purposefully invoked the benefits of Florida law, and it was neither fortuitous nor unexpected that he was asked to answer in a Florida court. Even without the contractual provi-

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29. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

30. *Calder v. Jones*, ____ U.S. ____, ____ S. Ct. ____ (1984) (52 LW 4349, 4351), *citing McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). *See Keeton v. Hustler Magazine, Inc.*, ____ U.S. ____, ____ S. Ct. ____ (1984) (52 LW 4346, 4348) ("Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum").

sions, Florida law would apply in this case.[31] But if the contract were silent on this point, it might be argued that Mr. Rudzewicz did not in signing it purposefully avail himself of the benefits of Florida law, or have reasonable notice of Florida's interest in the adjudication of its law. As this Court noted in *Kaulko v. Superior Court of California in and for the City and County of San Francisco*, 436 U.S. 84, 98 (1978), the fact that one state may be the center of gravity "for choice-of-law purposes does not mean that [that state] has personal jurisdiction over the defendant." But here, Mr. Rudzewicz specifically invoked the benefits of the forum by contracting for the application of Florida law, and thus had reason to anticipate that he might be called to answer for his conduct in a Florida court.[32]

3. Because Mr. Rudzewicz was obligated to make payment in Florida, he should reasonably have anticipated

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31. This contract was made in Florida because it was signed last by Burger King in Florida. *See Colhoun v. Greyhound Lines, Inc.*, 265 So.2d 18 (Fla. 1972). In Florida, "[t]he validity and obligation of a contract is determined by the lex loci contractus." *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145, 148 (S.D. Fla. 1944), *citing Aetna Life Ins. Co. v. Dunben*, 266 U.S. 389 (1924). *See Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873, 878-79 (5th Cir. 1978) (Florida law). Moreover, Florida law provides that where a place of payment is unspecified, the debtor must seek the creditor. *Williams v. Aeroland Oil Co.*, 155 Fla. 114, 20 So.2d 346 (1944); *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 (Fla. 3rd DCA 1982) (and cases cited). If the debtor fails to make payment, the cause of action accrues where the creditor resides. *Saf-T-Clean, Inc. v. Martin-Marietta Corp.*, 197 So.2d 8 (Fla. 1967); *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082, 1084 (Fla. 2nd DCA 1977).

32. *See United States Railway Equipment Co. v. Port Huron and Detroit R. Co.*, 495 F.2d 1127, 1130 (7th Cir. 1974); *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971); *Jadair, Inc. v. Van Lott, Inc.*, 512 F. Supp. 1141, 1145 (E.D. Wisc. 1981); *Rosen v. Solomon*, 374 F. Supp. 915, 920 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975); 1 MOORE'S FEDERAL PRACTICE ¶0.145[5], at 1628-29 (2nd ed. 1980).

that his default would cause economic injury in Florida. This Court has suggested that the place of a contract may be less important for jurisdictional purposes than is the "great weight" accorded to the "consequences" of a contractual obligation.[33] Thus, in its recent decision in *Calder v. Jones*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4349, 4351), this Court found that California's long-arm jurisdiction over a Florida publisher was appropriate not only because its magazine reached California, but also because "the brunt of the harm" was suffered there. Likewise here, Florida is the "focal point . . . of the harm suffered" by Burger King in this case.[34]

For the three reasons listed above, we think there can be no question that Mr. Rudzewicz should have "reasonably anticipate[d] being haled into court" to answer under Florida law for the injuries foreseeably caused in Florida by his breach of a contract made in Florida.[35] There was nothing fortuitous about this action.

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33. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943), *cited in Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission*, 339 U.S. 643, 648 (1949). *See Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 n.10 (8th Cir. 1969). *Cf. Kaulko v. Superior Court of California in and for the City and County of San Francisco*, 436 U.S. 84, 96 (1978) (*dictum*).

34. *Id. See O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 227 (6th Cir. 1972); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 375, 380, 382 (6th Cir. 1968).

35. *Keeton v. Hustler Magazine*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4346, 4348), *citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980). *Accord, Calder v. Jones*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4349, 4351); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977); *Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1069 (4th Cir. 1982); *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1314 (10th Cir. 1982). *Compare Kaulko v. Superior Court of California in and for the City and County of San Francsico, supra*, 436 U.S. at 97-98.

4. The action in Florida grew out of Mr. Rudzewicz' contacts with the forum; the "connexity" requirement is satisfied. In its recent decision in *Helicopteros Nationales De Colombia, S.A. v. Hall*, ... U.S. ....., ... S. Ct. ..... (1984) (52 LW 4491), this Court suggested that if a cause of action does not arise out of the defendant's activities in the forum state, that state may exercise general jurisdiction over the defendant only if its contacts constitute a "continuous and systematic general business" presence. If a defendant's presence is not so systematic as to create a general jurisdiction, the "connexity" requirement—the requirement that the cause of action arise out of the defendant's contacts with the forum—is a constitutional prerequisite for the exercise of specific jurisdiction. In this case, the cause of action does arise out of Mr. Rudzewicz' contacts with the forum, supporting the exercise of specific jurisdiction—and thus it is not unfair to subject Mr. Rudzewicz to jurisdiction in Florida on the basis of contacts which are less than "continuous and systematic."[36]

5. Mr. Rudzewicz was not a passive participant in this relationship; he was an educated, intelligent, active, equal partner in an arms-length transaction. As this Court held in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), the key question is whether the defendant purposely availed himself of the privilege of doing business with the forum state. When the defendant is a passive consumer—who merely responds to an offer made, for example, in a mail-order catalog—that kind of purposeful solicitation is not present, and it would be unfair to require the buyer to de-

36. *See Vishay Intertechnology, Inc. v. Delta International Corp., supra*, 696 F.2d at 1069; *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 228-29 (6th Cir. 1972); *First National Bank of Kansas City v. Ward*, 380 F. Supp. 782, 785 (W.D. Mo. 1974).

fend in a foreign jurisdiction.[37] That observation has led some courts to draw a general distinction between actions against buyers and actions against sellers—on the assumption that the buyer is always passive, and the seller is always actively trading his amenability to suit in the forum for his right to compete for sales.[38]

Of course it might be argued that even the decision of a buyer to purchase is an affirmative, active decision to invoke the benefits of the forum.[39] But at the very least, it can be said that in *some* cases buyers—especially non-consumer buyers—are not merely passive. The question is not whether the defendant is the buyer or seller, but whether or not the defendant engaged in some purposeful activity to invoke the benefits of the forum.[40] Thus in proper cases, an "active" buyer will be subject to litigation in a foreign jurisdiction.[41]

37. *Nordberg Division of Rex Chainbelt, Inc. v. Hudson Engineering Corp.*, 361 F. Supp. 903, 906 (E.D. Wisc. 1973), *citing Geneva Industries, Inc. v. Copeland Construction Corp.*, 312 F. Supp. 186 (N.D. Ill. 1970). *See United States Railway Equipment Co. v. Port Huron and Detroit R. Co.*, 495 F.2d 1127, 1130 (7th Cir. 1974); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 221, 227 n.13, 232 (6th Cir. 1972). And if it is not a violation of due process, it may well be an unfair trade practice under the Federal Trade Commission Act. *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976).

38. *See Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 368 (8th Cir. 1969), *citing Marshall Egg Transport Co. v. Bender Goodman Co.*, 275 Minn. 534, 148 N.W.2d 161 (1967).

39. "The defendant's alleged promise to pay plaintiff $40,000 at Wildwood, Florida constituted an affirmative decision by defendant to create a substantial contact with the State of Florida." *Thompson v. King*, 523 F. Supp. 180, 185 (M.D. Fla. 1981).

40. *See Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 151 (5th Cir. 1980); *Vena v. Western General Agency, Inc.*, 543 F. Supp. 779, 784 (N.D. Ill. 1982).

41. *See, e.g., Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1008-09 (5th Cir. 1982); *In-Flight Devices Corp. v. Van Dusen Air, Inc., supra*, 466 F.2d at 232 (distinguishing the "mail order" cases); *United States Railway Equipment Co. v. Port Huron and Detroit R. Co.*, 495 F.2d 1127, 1130 (7th Cir. 1974) (distinguishing the "mail order" cases).

In this case, it is undisputed that Mr. Rudzewicz initiated this contract, by making application for approval as a franchisee. And even if Burger King had made the first contact, Mr. Rudzewicz was an active participant in the negotiations.[42] For example, before the franchise and lease agreements were signed by Burger King, he succeeded in negotiating a substantial reduction in his rent after the third year (X. 9 at 3 or R. 35; *see* A17 n.12, Tr. 222, 500). And it should be remembered that the franchisees did make several payments to Burger King in Miami before defaulting. That has been held to constitute a form of affirmative conduct invoking the benefits of the forum.[43]

6. Florida has a clear interest in assuring the proper application of its own law. These contracts call for the application of Florida law. That helps tip the balance toward the exercise of jurisdiction in Florida.[44]

7. Florida has an interest in protecting its citizens from injury suffered in Florida, and that supports the exercise of jurisdiction.[45] It has been held that the interest

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42. "While the plaintiff initiated negotiations with the defendant, the defendant actively and voluntarily participated in them thereafter." *Electro-Craft Corp. v. Maxwell Electronics Corp., supra*, 417 F.2d at 369, *citing Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), *and Shealy v. Challenger Mfg. Co.*, 304 F.2d 102, 104 (4th Cir. 1962). *See Erie Press Systems, a Division of EFCO, Inc. v. Shultz Steel Co.*, 548 F. Supp. 1215, 1221 (W.D. Pa. 1982).

43. *See Continental American Corp. v. Camera Controls Corp*, 692 F.2d 1309, 1314 (10th Cir. 1982); *Standard Leasing Co. v. Performance Systems, Inc.*, 321 F. Supp. 977, 979 (N.D. Tex. 1971).

44. *See Southwest Offset, Inc. v. Hudco Publishing Co., supra*, 622 F.2d at 152; *Lieb v. American Pacific International, Inc.*, 489 F. Supp. 690, 697 (E.D. P... 1980); *Rosen v. Solomon*, 374 F. Supp. 915, 920 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975). *Cf. Leroy v. Great Western United Corp.*, 443 U.S. 173, 186 (1979); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

45. *See Keeton v. Hustler Magazine, Inc.* ___ U.S. ___, ___ S. Ct. ..... (1984) (52 LW 4346, 4347); *Vishay Intertechnology,*

(Continued on following page)

of the forum in the outcome of particular litigation is a powerful argument for jurisdiction in that forum.[46]

8. Finally, it should be noted that Mr. Rudzewicz was no less inconvenienced by the necessity of litigating in Florida than would Burger King be inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. At best, this consideration is a standoff.[47]

If permitted to brief this case on the merits, we hope to make these and other points in greater depth. At the least, we hope to have suggested already the substantial authority supporting our position—and the significant number of analogous state statutes and federal decisions implicated by the circuit court's decision in this case. We do

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Footnote continued—

Inc. v. Delta International Corp., 696 F.2d 1062, 1069 (4th Cir. 1982); *Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309, 1313-14 (10th Cir. 1982); *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 644 (5th Cir. 1980), *cert. denied*, 451 U.S. 910 (1981); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 937 (10th Cir. 1977); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 221, 223 (6th Cir. 1972); *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 385 (6th Cir. 1968).

46. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878), *cited in Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 956 (1960). *See* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1129 (1966). *Cf. McGee v. International Life Ins. Co.*, 335 U.S. 220, 223 (1959); *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313-14 (1949).

47. *See Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1011 n.6 (5th Cir. 1982); *Standard Fittings Co. v. Sapag, S.A., supra*, 625 F.2d at 644; *Southwest Offset, Inc. v. Hudco Publishing Co., supra*, 622 F.2d at 152; *Pedi Bares, Inc. v. P & C Food Markets, Inc., supra*, 567 F.2d at 937; *Electro-Craft Corp. v. Maxwell Electronics Corp., supra*, 417 F.2d at 370; *Product Promotions, Inc. v. Cousteau, supra*, 495 F.2d at 498; *Jadair, Inc. v. Van Lott, Inc.*, 512 F. Supp. 1141, 1145 (E.D. Wisc. 1981); *Lieb v. American Pacific International, Inc.*, 489 F. Supp. 690, 697 (E.D. Pa. 1980); *Rosen v. Solomon*, 374 F. Supp. 915, 920 (E.D. Pa. 1974), *aff'd*, 523 F.2d 1051 (3rd Cir. 1975). *Cf. McGee v. International Life Ins. Co., supra*, 335 U.S. at 223.

not contend that this authority is unanimous; there are decisions consistent with the circuit court's decision in this case.[48] But these cases only emphasize the unsettled nature of this question in the absence of a definitive ruling by this Court. Because the question is so far-reaching—because it potentially implicates the long-arm jurisdiction exercised by every state—we respectfully submit that a significant federal question is presented by this case.[49]

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48. *See, e.g., Hydrokinetics, Inc. v. Alaska Mechanical Inc.*, 700 F.2d 1026 (5th Cir. 1983); *U.S. appeal pending; Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982); *Telco Leasing, Inc. v. Marshall County Hospital*, 586 F.2d 49 (7th Cir. 1978); *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974).

49. As a final point, especially in a brief concerned with fundamental fairness, we feel it appropriate to comment on the circuit court's determination to decide this case solely on the basis of Mr. Rudzewicz' contacts with the forum relative to the contract claims invoked under §48.193(1)(g). As we have noted, Burger King also claimed trademark infringement, and that is a species of tort. *See Norman M. Morris Corp. v. Weinstein*, 466 F.2d 137 (5th Cir. 1972); *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F.2d 405 (6th Cir. 1963); *Altech Industries, Inc. v. Al Tech Specialty Steel Corporation*, 528 F. Supp. 521 (D. Del. 1981). Moreover, as we have noted, 15 U.S.C. §1116 permits injunctive relief to enforce trademark claims, which relief Burger King sought and received in this case, and provides for nationwide service of process in aid of such injunctive relief. Under such circumstances, the only jurisdictional question before the district court regarding these claims, under the first part of the first sentence of Rule 4(e), Fed. R. Civ. P., was whether Mr. Rudzewicz had sufficient contacts with the *United States* to support the exercise of personal jurisdiction over him in the United States. *See Burstein v. State Bar of California*, 693 F.2d 511, 515-16 (5th Cir. 1982), *citing Federal Trade Commission v. Jim Walter Corp.*, 651 F.2d 251, 254-56 (5th Cir. 1981), *and Black v. Acme Markets, Inc.*, 564 F.2d 681 (5th Cir. 1977). Of course, there would remain issues of venue and service of process. *Burstein v. State Bar of California, supra*, 693 F.2d at 515-16 n.8, but those issues were not raised by Mr. Rudzewicz before the circuit court, and have been waived. On the *jurisdictional* question, acknowledgement of Burger King's infringement claims should have ended the inquiry, forestalling the circuit court's remand with instructions to dismiss.

Moreover, even if the federal statute were silent concerning the "circumstances" under which service might be made (Rule 4(e), first sentence), we would then focus on the second sen-

(Continued on following page)

CONCLUSION

For the reasons provided above, it is respectfully submitted that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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June 20, 1984

Footnote continued—

tence of Rule 4(e)—adopting the service rules of the state in which the district court is held—and that leads us to the Florida statute governing tortious acts committed in Florida, §48.193(1)(b). *See Burstein v. State Bar of California, supra*, 693 F.2d at 514-17, *cited in DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1266-68 (5th Cir. 1983). *But see Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 585 (5th Cir. 1982) (federal long-arm standard always applies). If permitted to brief this case, we will demonstrate that by overwhelming authority in Florida, §48.193(1)(b) clearly applies to Mr. Rudzewicz' alleged tortious conduct in this case, because it foreseeably caused damage in Florida, and that damage was an element of the tort. And we will also demonstrate the constitutionality of the application of this statute in that context. *See Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd.*, 543 F.2d 1107 (5th Cir. 1976) (upholding §48.193(1)(b) in trademark case); *Rebozo v. Washington Post Co.*, 515 F.2d 1208 (5th Cir. 1975) (upholding §48.193(1)(b) in libel case). *See also Simon v. United States*, 644 F.2d 490 (5th Cir. 1981); *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974).

Thus, had the circuit court acknowledged Burger King's trademark claims in this case—whether reviewing the question of personal jurisdiction relative to those claims under federal law or under state law—it could not have remanded this case with instructions to dismiss. It was fundamentally unfair for the circuit court to entertain Mr. Rudzewicz' constitutional challenge to the exercise of jurisdiction over Burger King's contract claims, without any acknowledgement of the independent basis for jurisdiction relative to its claims of trademark infringement.

APPENDIX

BURGER KING CORPORATION, a Florida Corporation,
Plaintiff-Appellee,

v.

Brian MACSHARA, Defendant,
John Rudzewicz, Defendant-Appellant.

No. 82-5424.

United States Court of Appeals,
Eleventh Circuit.

Feb. 13, 1984.

Franchisee appealed from judgment of the United States District Court for the Southern District of Florida, James W. Kehoe, J., awarding franchisor damages of $228,875.40 as well as costs of $2,151.06 and attorney fees of $30,000, in franchisor's breach of contract and trademark infringement action. The Court of Appeals, Vance, Circuit Judge, held that even though franchisee's activities fell within reach of Florida's long-arm statute, invocation of statute offended fundamental fairness which was touchstone of due process.

Reversed and remanded.

Johnson, Circuit Judge, filed dissenting opinion.

1. Constitutional Law (Key) 305(4)
Federal Courts (Key) 373

In diversity case, federal district court must exercise its jurisdiction in accordance with due process and law of state in which court sits. U.S.C.A. Const.Amend. 5.

2. Courts (Key) 12(2)

No defendant can be compelled to answer in state's courts unless minimum contacts exist between defendant, forum state and litigation such that maintenance of suit does not offend traditional notion of fair play and substantial justice.

3. Constitutional Law (Key) 305(5)

In deference to sovereignty of forum's sister states, due process requires that there be some act by which defendant purposely avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws. U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law (Key) 305(4)

Due process restrictions on jurisdiction of courts are more than guaranty of immunity from inconvenient or distant litigation; they are consequence of territorial limitations on power of respective states. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law (Key) 305(5)

State cannot justifiably assert jurisdiction over individual with whom it has no constitutionally cognizable contacts or ties.

6. Constitutional Law (Key) 305(5)

Although franchisee's activities fell within reach of Florida long-arm statute, invocation of statute offended fundamental fairness which is touchstone of due process, where only face-to-face contacts franchisee had with franchisor throughout months of protracted negotiations were with representatives of franchisor's Michigan office, franchisee maintained no staff in state of Florida, contracts contemplated start of Michigan restaurant whose profits would derive solely from food sales made to customers in Michigan, local Michigan office was responsible for providing all the services due franchisee, and franchisee was financially unprepared to meet costs of suit in Florida. West's F.S.A. § 48.193(1)(g); U.S.C.A. Const.Amends. 5, 14.

Thomas H. Oehmke, Oehmke & Richardson, Detroit, Mich., for defendant-appellant.

Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Joel S. Perwin, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

VANCE, Circuit Judge:

In 1979, with the economy poised on the brink of recession, John Rudzewicz and Brian MacShara decided to purchase a Burger King restaurant franchise near Detroit, Michigan. This appeal, filed by Rudzewicz,[1] is the unforeseen outcome of their ill-timed venture.

Rudzewicz, a senior partner in a Michigan accounting firm, agreed to secure investment capital while MacShara was to handle day-to-day operations. MacShara's experience included stints as a supervisor in his father's Michigan construction firm and as a onetime assistant at a Burger King restaurant. Both were and are residents and citizens of the state of Michigan.

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

1. MacShara has not appealed his judgment.

The Burger King Corporation is incorporated in Florida and headquartered in Miami. The company maintains a district office in Birmingham, Michigan. During the course of negotiations, which lasted five months, the Michigan district office was Burger King's sole representative in dealings with Rudzewicz and MacShara. H.G. Hoffman, the Michigan district manager, evaluated their proposal and wrote them on the company's behalf to convey approval of their franchise application. Following lengthy discussions, Hoffman persuaded them to acquire an existing store in Drayton Plains, Michigan to avoid the higher rent that would be entailed if they insisted upon construction of a new building. He also convinced them to purchase and install $165,000 worth of equipment before the final rental charge had been computed.

At the conclusion of each round of Michigan negotiations, the Miami office mailed Rudzewicz printed documents for his signature. The documents, once signed, were returned to Burger King headquarters in Miami for completion.[2] Following corporate approval, headquarters then mailed Rudzewicz copies of the completed documents for his files.

After granting initial approval, Burger King decided to schedule the grand opening for May 31, 1979, the close of its fiscal year, to ensure that the sale appeared in the company's year-end statement. On May 29, the day the final agreements arrived for signature, Rudzewicz and MacShara finally learned what rent Burger King expected them to pay. The figure was far in excess of the amount Rudzewicz had projected.[3] He telephoned Hoffman and demanded a lower figure. According to Rudzewicz, Hoffman replied that the rent computation was out of his hands. If Rudzewicz was unwilling to accept the figure Burger King proposed, Hoffman continued, he was always free to decline the franchise, rip out the fixtures he had installed at his own expense, and resell them at a loss. On June 4 Rudzewicz and MacShara signed the lease and franchise agreements in their individual capacities at a Michigan closing ceremony attended by employees of the local district office.

2. The record does not identify who mailed the papers to Miami.

3. *See infra* note 4.

In the lease agreement, Burger King agreed to lease the Drayton Plains store for a term of twenty years. Rent was set at a monthly minimum of $4,166.66 in the first two years and $5,286.58 thereafter or 8½% of monthly gross sales, whichever was greater.[4] The franchisees were required to remit rent, as well as royalties, tax refunds and other designated fees to Burger King headquarters in Miami.[5]

In return Burger King promised use of the Burger King mark, architectural advice, advertising services, financial counseling, and operations consultation. At trial, an executive from the Miami headquarters office testified that the Michigan district office was administratively re-

4. The lease called for minimum annual rent consisting of 13.4% of "construction costs." At trial, Rudzewicz testified that Michigan Burger King officials estimated construction costs would equal approximately $180,000. This figure was based on the costs of renovating the existing Drayton Plains facility.

Rent calculated on a base of $180,000 would equal $2,010 a month. Rudzewicz boosted his projection to $2,500 to amortize the additional cost of original construction. Although he testified that Hoffman promised that the rent at Drayton Plains would be lower than that at a new facility, the rent that Burger King finally proposed was computed on a base equal to that estimated for newly constructed facilities. This testimony stands undisputed and uncontradicted.

5. Rudzewicz and MacShara signed equipment contracts containing similar provisions with the Davmore division of Burger King.

sponsible for all of the supervision, advertising and consultation due under the contract. With the exception of a Burger King University management course which MacShara attended in Florida and the Miami payment obligation, the contracts provided for no contact of any kind between the Florida headquarters and the franchisees.

Within weeks of opening, the store had fallen behind in payments. Rescheduling negotiations broke down, and Burger King sued Rudzewicz and MacShara in diversity in the Southern District of Florida for breach of contract and trademark infringement. Defendants entered a special appearance to contest personal jurisdiction. After losing this motion, they filed a counterclaim seeking damages under the Michigan Franchise Investment Act.[6] A bench trial ensued and Judge Kehoe entered judgment for Burger King on both the contract claim and the counterclaim. Damages of $228,875.40 were assessed against defendants in their individual capacities. In addition, Burger King was awarded costs of $2,151.06 and $30,000 in attorneys fees.

On appeal, Rudzewicz contests his judgment for lack of personal jurisdiction as well as on substantive grounds. He further appeals the ruling on the counterclaim. Because we conclude that the trial court lacked personal jurisdiction over Rudzewicz, we do not reach the merits.

I.

[1] In a diversity case, a federal district court must exercise its jurisdiction in accordance with due process and the law of the state in which the court sits. *Bankhead Enterprises, Inc. v. Norfolk & Western Ry.*, 642 F.2d 802, 804 (5th Cir. Unit B 1981). Although Rudzewicz concedes

6. Mich.Comp.Laws Ann. § 445.1501 *et seq.*

that his activities fall within the reach of the Florida long-arm statute, Fla.Stat. § 48.193(1)(g),[7] he argues that invocation of that statute under these circumstances exceeds the bounds of due process.

[2, 3] No defendant can be compelled to answer in a state's courts unless minimum contacts exist among defendant, the forum state and the litigation such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 203, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In deference to the sovereignty of the forum's sister states, due process requires "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94, 297, 100 S.Ct. 559, 565-66, 567, 62 L.Ed.2d 490 (1980); *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 159-60.

This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami. This is a

7. That section reads:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

. . .

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

subtle and difficult problem. As Mr. Justice White has noted, "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff," a question which applies *a fortiori* to individual defendants, "has deeply divided the federal and state courts." *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 445 U.S. 907, 909, 100 S.Ct. 1087, 1089, 63 L.Ed.2d 325 (1980) (White, J., joined by Powell, J., dissenting from denial of certiorari); *see also Baxter v. Mouzavires*, 455 U.S. 1006, 102 S.Ct. 1643, 71 L.Ed.2d 875 (1982) (White, J., joined by Powell, J., dissenting from denial of certiorari); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994, 102 S.Ct. 1623, 71 L.Ed.2d 856 (1982) (White, J., joined by Burger, C.J. and Powell, J., dissenting from denial of certiorari). *Cf. Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 601-02 & n. 9 (7th Cir. 1979). Mindful of this confusion and the continuing uncertainty as to the meaning of *Hanson v. Denckla* and its progeny, we focus our analysis on the guidelines set forth in Supreme Court precedent and the case law of this circuit.

II.

[4, 5] Due process restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. at 251, 78 S.Ct. at 1238. Hence, the minimum contacts measure is not a question of "a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to" the laws of the forum state. *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 160. A state cannot justifiably assert jurisdiction over an individual with whom it has

no constitutionally cognizable contacts or ties. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. at 565-66.

The *Hanson* requirement of purposeful activity within the forum state reflects two contrasting considerations. Particularly in the commercial context, fairness dictates that a defendant who derives profits from deliberate contacts within the forum state should be responsible for the costs such activities incur. On the other hand, due process abhors the unfair surprise that results when a party is haled into court in a state with which he lacks deliberate connections. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir.1974).

The interplay of these considerations—responsibility and preparedness—can plainly be seen in the leading Supreme Court cases of *Shaffer v. Heitner*, *World-Wide Volkswagen*, and *McGee v. International Life Insurance Co.* In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), plaintiff predicated Delaware jurisdiction in part on the fact that defendants had accepted directorships in Greyhound, Inc., a corporation chartered in Delaware but headquartered in Arizona. Reasoning that directorial appointment in and of itself did not notify defendants that they risked being sued in the state of formal incorporation, the Court concluded that they had not purposefully availed themselves of the opportunity to conduct activities in the state of Delaware so as to confer jurisdiction there. 433 U.S. at 216, 97 S.Ct. at 2586. Three years later, the Court further restricted the scope of personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Court denied jurisdiction over a suit arising from an automobile accident in the forum state of Oklahoma, reasoning that the local New Jersey car dealer

who sold plaintiff the car could not have expected that the sale might give rise to products liability litigation halfway across the country. 444 U.S. at 297-98, 100 S.Ct. at 567-68.

McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), reached the opposite outcome on the basis of slender contacts which nevertheless left the defendant prepared for the possibility of out-of-state litigation. In that case, the Texas successor to a defunct life insurance company wrote Franklin, a California resident, offering to reinsure the policy he held from its predecessor. Franklin accepted the offer and commenced mailing premiums from California to Texas. After Franklin died, the insurer refused to honor the policy. Franklin's beneficiary sued in California state court. Despite the scant contacts between the company and the forum state, the Court concluded that jurisdiction was properly asserted.[8] The defending insurer had derived profit from the California market by soliciting revenue from one of its residents. *Hanson*, 357 U.S. at 251-52, 78 S.Ct. at 1238-39. By virtue of its direct mail offer, furthermore, the insurer had reason to know that its business dealings brought it into contact with the

8. In reaching its conclusion, the Court noted that California had an interest in affording redress to California residents when out-of-state insurers refused to honor their claims. The Court accorded that interest substantial weight because the prohibitive costs of distant litigation otherwise would force many claimants to forgo worthwhile claims. 355 U.S. at 223, 78 S.Ct. at 201. Where a party claiming breach of contract can afford to sue outside of the forum state, as here, the state interest in redress is correspondingly weak. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 n. 27 (5th Cir.1974). *Cf. Lakeside Bridge & Steel Co.*, 597 F.2d at 602 n. 11 ("The forum state has a lesser interest in protecting a corporation in an interstate contract dispute, especially when the corporation left the state to solicit and secure the contract, because the effects of a commercial contract are unlikely to involve danger to persons or things within the state's border.")

forum state and it could adjust its premiums accordingly to reflect the added financial risk of litigation. *See World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

In contrast with their typical ease in reconciling jurisdiction over non-resident sellers, courts have encountered particular difficulties in applying *Hanson's* requirement of purposeful activity to suits against non-resident buyers. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir.1972). In part this reflects a judgment that the activity of incurring a debt with an in-state seller, however purposeful, is not an activity which occurs in the seller's state. *See Lakeside Bridge & Steel Co.*, 597 F.2d at 601-04. The geographical location of activities such as debt incurrence cannot provide a workable basis for determining whether jurisdiction is fair in any given circumstance. A rule which would require determining the geographical origin of a given debt would in our mind unwisely revive the effort to pinpoint the situs of intangibles which in rem jurisdiction entailed. The often metaphysical character of this inquiry in the context of in rem jurisdiction justifiably led the Supreme Court to abandon it in favor of the functional test of fairness enunciated in *International Shoe*. *See Shaffer v. Heitner*, 433 U.S. at 212, 97 S.Ct. at 2584.

We recognize, of course, that there are many circumstances in which a buyer fairly can be held to account in a foreign jurisdiction for the debts he has incurred. While the stereotypical image of buyers as the passive recipients of sellers' attentions assumes that buyers lack notice of the seller's residence and financial resources to defend suit there, *In-Flight Devices Corp.*, 466 F.2d at 233; Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U.Ill.L.F. 574, 576, this assumption is not always true. Some buyers can

demand terms; others must accede to them. Thoughts of profit motivate some orders; more personal desires impel others. Purchases may involve large amounts or small, a single transaction or many. The buyer may be a local business or an interstate concern, ordering directly from the seller's headquarters or solely through the local hometown agent.

This array of considerations complicates efforts to adjudicate such jurisdictional challenges in a reasoned and coherent manner. We believe, however, that the crux of the distinction between passive and active buyers stems from a concern for unfair surprise, both in terms of reasonable notice and financial preparedness. Mail-order customers, for example, probably would not expect to be subject to suit in a foreign jurisdiction and often would not find it financially worthwhile to defend an action there. We therefore agree with other jurists and commentators who have noted the unfairness of asserting jurisdiction over out-of-state customers to collect payments due on modest personal purchases. *Baxter v. Mouzavires*, 455 U.S. at 1006, 102 S.Ct. at 1643; *In-Flight Devices Corp.*, 466 F.2d at 232; Currie, *supra*, at 574-77. *Cf. Rush v. Savchuk*, 444 U.S. 320, 329, 100 S.Ct. 571, 577-78, 62 L.Ed.2d 516 (1980) (insured not expected to defend suit in every state where insurer does business). A contrary result would sanction suit against mail-order customers in the home office's state even though they had never set foot there and even though the price they paid could not be lowered to reflect the risk of suit. Consumers would inevitably suffer a spate of default judgments if defense of small claims required a cross-country trek whose costs exceeded the expense of judgment itself. *McGee*, 355 U.S. at 223, 78 S.Ct. at 201. Counsel for Burger King agrees that such an outcome would be fundamentally unfair.

Our concern for adequate notice and fairness to buyers does not of course necessitate a broad rule immunizing purchasers generally from suit in the seller's home state. Where commercial parties of comparable bargaining strength contract for performance of manufacturing or services within that state's bounds, we have consistently held that jurisdiction comports with due process, even if negotiations occur elsewhere. *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 644-45 (5th Cir.1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981); *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 382 (5th Cir.1980); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir.1980) (per curiam); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974). *But see Lakeside Bridge & Steel v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907, 100 S.Ct. 1087, 63 L.Ed.2d 325 (1980). In short, the principle of fairness which is the essence of due process must be the compass which guides our inquiry.

We recognize that this case, in aspects, resembles commercial transactions which properly give rise to jurisdiction. Rudzewicz and MacShara were two Michigan entrepreneurs eager for the profits a franchise could promise. They signed contracts calling for payments exceeding $1 million over the life of the venture. Despite the expense of the transaction and its commercial end, however, we are troubled by elements of surprise which, if sanctioned, could ultimately sow the seeds of default judgments against franchisees owing smaller debts.

[6] Nothing in the course of the negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of

protracted negotiations was with representatives of the Michigan office. Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony. There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he has never even visited the state.

The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a Burger King facility there, required no performance in the state of Florida. Under the contract, the local Michigan district office was responsible for providing all of the services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from that office alone. To Rudzewicz, the Michigan office was for all intents and purposes the embodiment of Burger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters.[9] *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S.Ct.Rev. 77, 89-90; Comment, *Constitutional Limits on State Long Arm Jurisdiction*, 49 U.Chi.L. Rev. 156, 167 n. 56 (1982).

9. This case bears a resemblance to *Arthur, Ross & Peters v. Housing, Inc.*, 508 F.2d 562 (5th Cir.1975) (adopting the opinion of the district court). Defendant, a North Carolina realtor, persuaded plaintiff, a Texas partnership, to purchase land in North Carolina. A lawsuit later ensued in Texas federal court. We agreed that the trial court lacked jurisdiction since performance of the contract was to occur entirely outside Texas borders. *Id.* at 565. *See also Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334, 1336-37 (5th Cir.1971).

Given that the office in Rudzewicz' home state conducted all of the negotiations and wholly supervised the contract, we believe that he had reason to assume that the state of the supervisory office would be the same state in which Burger King would file suit. Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state.[10] We believe that this is one of those cases where "there is something to the notion that a party who has gone into a foreign State to do business with one of its residents can be expected to go back to bring suit." Currie, *supra*, at 574.[11]

Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. The franchise relationship in particular is fraught with potential for financial surprise. The device of the franchise gives local retailers the access to national

10. Burger King asserts that actual notice was provided by contractual provisions establishing that Florida was the state of the contract and that its choice-of-law rules would govern. We doubt, however, that boilerplate declarations in a lengthy printed contract suffice to provide actual notice of suit. In addition, *Hanson v. Denckla* established that the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction. 357 U.S. at 254, 78 S.Ct. at 1240.

11. In reaching this conclusion, we find support in *Shaffer v. Heitner*. Defendants in both cases were sophisticated businessmen who had reason to understand that they were entering into a business relation with a corporation chartered in the forum state. Yet in each case it was reasonable to assume that all working contact with the corporation would emanate from another state—in *Shaffer*, from corporate headquarters in Arizona; in this case, from the district office in Birmingham, Michigan.

trademark recognition which enables them to compete with better-financed, more efficient chain stores. This national affiliation, however, does not alter the fact that the typical franchise store is a local concern serving at best a neighborhood or community. Neither the revenues of a local business nor the geographical range of its market prepares the average franchise owner for the cost of distant litigation. *Cf. In-Flight Devices Corp.*, 466 F.2d at 234 (a business that lacks substantial out-of-state sales may be financially unprepared to defend suit outside of its home base). In *World-Wide Volkswagen*, for example, the Court held a local car dealer immune from suit despite its participation in a nationwide servicing plan. The Court reached this conclusion because, in part, the limited range of the retailer's market was unconducive to insuring against the cost of defending an out-of-state personal injury suit. 444 U.S. at 297-98, 100 S.Ct. at 567-68. The same consideration militates against jurisdiction in this case.

The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. In a franchise contract, "the franchisor normally occupies [the] dominant role . . ." Annot., 67 A.L.R.3d 1299, 1302 (1975). *See, e.g., Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598, 67 A.L.R.3d 1291 (1973), *cert. denied*, 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed. 2d 475 (1974). In recent years, certain states, including Michigan, have moved to enact statutes to police the more flagrant excesses of franchises. Annot., 67 A.L.R.3d at 1301.

We discern a characteristic disparity of bargaining power in the facts of this case. There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit

in Florida.[12] He signed a standard form contract whose terms were non-negotiable and which appeared in some respects to vary from the more favorable terms agreed to in earlier discussions. In fact, the final contract required a minimum monthly rent computed on a base far in excess of that discussed in oral negotiations. Burger King resisted price concessions, only to sue Rudzewicz far from home.[13] In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.[14]

In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida.

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12. *See supra* note 4. Following protests on Rudzewicz' part, Burger King reduced the monthly minimum rent for the third year of the contract from $5,286.58 to $4,416.66. The reduction represented savings of $10,439.04. While sizable, this amount pales against the $641,900 disparity between the total rent Rudzewicz expected to pay and the amount Burger King charged.

13. We note that several Burger King franchisees have challenged personal jurisdiction in Florida courts without success. *See Burger King Corp. v. Elliott*, No. 80-2694-CIV-EBD (S.D.Fla. Jan. 9, 1981); *Burger King Corp. v. Wagner*, No. 80-942-CIV-EBD (S.D.Fla. July 16, 1980); *Burger King Corp. v. Robinson*, No. 79-5824-CIV-EPS (S.D.Fla. May 30, 1980); *Burger King Corp. v. Snow*, No. 80-295-CIV-SMA (S.D.Fla. March 18, 1980); *Burger King Corp. v. Levine*, No. 80-5852(08) (Cir.Ct.Fla. July 21, 1980).

14. Burger King urges us to impute MacShara's matriculation at Burger King University to Rudzewicz for purposes of minimum contacts. The company reasons that the ties of one partner can be attributed to all partners for suits arising out of their common ventures. We need not decide that question here, however, since Rudzewicz and MacShara never formed a partnership. They signed the agreements in their individual capacities. We conclude that contacts cannot be attributed from one individual defendant to another because "[t]he requirements of *International Shoe* . . . must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980) (emphasis added).

Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. We therefore reverse the judgment and remand with directions to vacate the judgment and dismiss the case.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the decision of the majority that appellant did not have sufficient minimum contacts with the state of Florida to support the exercise of personal jurisdiction by a federal district court sitting in diversity. To decide whether the exercise of jurisdiction comports with the requirements of due process, this Court must determine whether the defendant "has purposefully availed himself of the benefits and protection of the forum state's laws, whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state." *Austin v. North American Forest Products*, 656 F.2d 1076, 1089 (5th Cir.1981) (citing *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974)).[1]

This Court has recognized that the purposeful availment prong of the *Product Promotions* test may be satisfied even if the defendant performs no physical acts within the forum state, as long as his contacts with the forum were "'deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise'." *Austin, supra*, at 1089-90 (quoting *Product Promotions, supra*, at 496) (footnotes omitted). In *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921 (5th Cir.1981) (per curiam), the Court determined that the purposeful availment prong was satisfied when the defendant entered a contract that specifically provided that it would be governed by the laws of the forum state. *Id.* at 923. In this case, both the franchise agreement and the lease signed by appellant and Burger King specifically provided that the laws of Florida would govern their interpretation. Thus, appellant has purposefully availed himself of the benefits and protections of Florida's laws.

The forum state has a special interest in exercising jurisdiction when the contract in dispute calls for the application of the forum state's laws. *See Marathon, supra*, at 923 (forum has interest when contract requires application of forum's laws); *Product Promotions, supra*, at 498 (forum has interest when its laws will be "of some relevance in resolving the suit"). Thus, Florida here has a special interest in exercising jurisdiction over appellant.

Finally, no great imbalance of convenience here argues for one forum over the other. Appellant cannot successfully argue that, because a large corporation sues him as an individual, the inconvenience to him can defeat personal jurisdiction. *See Marathon, supra*, at 923.

Ignoring this binding precedent, the majority opinion questions whether appellant had reasonable notice of the possibility that he would be haled into court in Florida and whether he was adequately prepared for that contingency, and it warns that a determination that jurisdiction exists in this case may mean that consumers, nonresident purchasers whom the majority likens to appellant, also will be subjected to the jurisdiction of foreign

1. The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

courts simply because they have purchased goods under contracts requiring them to remit payment to the foreign state. In raising this specter, the majority does not give proper weight to the recognized fact that appellant was a senior partner in a Michigan accounting firm, who for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements, and who obligated himself personally to contracts requiring over time payments that exceeded $1 million. Appellant, who clearly does not resemble the average consumer, signed contracts that explicitly provided that Florida law would govern their interpretation. He therefore had reasonable notice of the possibility that he would be sued under the contracts in the state of Florida, and he should have been adequately prepared for that contingency.

(Filed August 20, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

vs.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

ORDER

This matter is before the Court on the motion of Defendants' for Summary Judgment, etc., The motion has been fully briefed by both sides.

The Court has examined the briefs filed in support of the motion and filed in opposition to it and has determined that a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements. It has also been held that venue in the Southern District of Florida is proper in such actions. Numerous recent cases in this Court supply authority for the foregoing propositions. See *Burger King Corporation v. David M. Elliott*, Case No. 80-2694-Civ-EBD; *Burger King Corporation v. Gary L. Wagner*, Case No. 80-942-Civ-EBD; *Burger King Corporation v. Paul D. Snow, Jr., et. al.*, 80-295-Civ-SMA; *Burger King Corporation v. Blanchard W. Robinson and Utopia Systems, Inc.*, Case No. 79-5824-Civ-EPS; *Burger King Corporation v. Gerald A. Mason, et. al.*, Case No. 78-2932-Civ-EBD.

The Court considers the Defendants' remaining argument to be without merit. Accordingly, it is

ORDERED AND ADJUDGED that the motion for summary judgment, etc., is DENIED. Defendants shall have twenty (20) days from the date hereof in which to file their Answer to the Complaint. It is further

ORDERED AND ADJUDGED that the Court will defer ruling on Plaintiff's motion for preliminary injunction until final hearing. This cause will be accelerated and set for final hearing by separate order after an answer has been received. The parties should anticipate that this cause will be set for final hearing before the end of this year.

DONE AND ORDERED in chambers at Miami, Florida, this 20th day of August, 1981.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

CC: Barry L. Meadow, Esquire
Paul W. Harty, Esquire
Thomas H. Oehmke, Esquire

(Filed March 3, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

vs.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER THEREON

THIS CAUSE came on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, pursuant to Defendant, BRIAN MacSHARA's Waiver of Jury Demand dated January 29, 1982, pursuant to Defendant, JOHN RUDZEWICZ's, Waiver of Jury Demand dated January 20, 1982, and pursuant to Plaintiff, BURGER KING CORPORATION's, Waiver of Jury Demand pursuant to Rule 39(a) of the Federal Rules of Civil Procedure announced on the record at the trial of this cause which commenced on February 2, 1982. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This Court makes the following findings of fact:

1. That Plaintiff, BURGER KING CORPORATION, is a Florida corporation with its principal place of business located in Miami, Dade County, Florida.

2. That Defendant, JOHN RUDZEWICZ, is a citizen and resident of the State of Michigan.

3. That Defendant, BRIAN MacSHARA, is a citizen and resident of the State of Michigan.

4. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

5. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

6. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

7. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

8. That the above-described Franchise Agreement and Lease or Sub-Lease Agreement pertain to Burger King Restaurant Number 775 located at 4983 Dixie Highway, Drayton Plains, Michigan.

9. That Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, signed and entered into the above-described Franchise Agreement and Lease or Sub-Lease Agreement in their individual capacities.

10. That pursuant to Paragraph 8A of the above-described Franchise Agreement, franchise royalties were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

11. That pursuant to Paragraph 13 of the above-described Franchise Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

12. That pursuant to Section 3.1 of the above-described Lease or Sub-Lease Agreement, rental payments were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

13. That pursuant to Section 6.1 of the above-described Lease or Sub-Lease Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

14. That there was an agreement between the parties that all payments by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, for all supplies and other materials ordered by said Defendants from Plaintiff's DAVMOR DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

15. That there was an agreement between the parties that all supplies and other materials ordered by said Defendants from Plaintiff's DISTRON DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

16. That pursuant to Paragraph 8B of the above-described Franchise Agreement, advertising fees were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

17. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Forty-Four Thousand, Five Hundred Sixty-Seven Dollars and Seventy-Three Cents ($44,567.73), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8A of the Franchise Agreement for franchise royalties.

18. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Thirty-Four Thousand, Five Hundred One Dollars and Thirty-Six Cents ($34,501.36), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8B of the Franchise Agreement for advertising.

19. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of One Hundred-Eleven Thousand, Seven Hundred-Ten Dollars and Sixty Cents ($111,710.60), which is due and owing to BURGER KING CORPORATION pursuant to Section 3.1 of the Lease or Sub-Lease Agreement for rent.

20. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to reimburse BURGER KING CORPORATION the sum of Eleven Thousand, Seventy-Six Dollars and Forty-Four Cents ($11,076.44), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 13 of the

Franchise Agreement and pursuant to Section 6.1 of the Lease or Sub-Lease Agreement for taxes.

21. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Six Thousand, Twenty-Six Dollars and Eighty Cents ($6,026.80), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DAVMOR DIVISION.

22. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Twenty Thousand, Nine Hundred Ninety-Two Dollars and Forty-Seven Cents ($20,992.47), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DISTRON DIVISION.

23. That as of January 15, 1982, Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe to Plaintiff, BURGER KING CORPORATION, the total sum of Two Hundred Twenty-Eight Thousand, Eight Hundred Seventy-Five Dollars and Forty Cents ($228,875.40).

24. That Plaintiff, BURGER KING CORPORATION, mailed to the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, and the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, received the appropriate Notice of Default letters, Default letters, and Termination of Franchise letters pursuant to the provisions of Paragraph 16 of the above-described Franchise Agreement and pursuant to the provisions of Section 8.1 of the above-described Lease or Sub-Lease Agreement.

25. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, make any material statements of fact to the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, which were false.

26. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, represent or give the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, false figures pertaining to the past gross-sales history of Burger King Restaurant Number 775 or false figures pertaining to the projected or estimated future gross-sales of Burger King Restaurant Number 775.

27. That any statements of fact made by Plaintiff, BURGER KING CORPORATION, and its agents, servants or employees, to Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, pertaining to gross-sales figures for Burger King Restaurant Number 775, either in the past or to be expected in the future, were joined and merged into the above-described Franchise Agreement and said Franchise Agreement, pursuant to Paragraph G, Introduction, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

28. That at all times during the transactions between the Defendants, JOHN RUDEZWICZ and/or BRIAN MacSHARA, and the Plaintiff, BURGER KING CORPORATION, the Defendants, JOHN RUDZEWICZ and BRIAN

MacSHARA, were and are experienced and sophisticated businessmen and at no time were the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, acting under economic duress or disadvantage imposed by the Plaintiff, BURGER KING CORPORATION.

29. That the cause of the low gross-sales volume of Burger King Restaurant Number 775 located in Drayton Plains, Michigan, was and is due to additional competition and the prevailing economic conditions in the surrounding area of said restaurant.

30. That Paragraph 14 of the Franchise Agreement and Section 12.2 of the Lease or Sub-Lease Agreement prohibited assignment of the Franchise Agreement and/or the Lease or Sub-Lease Agreement without the written consent and approval of Plaintiff, BURGER KING CORPORATION.

31. That the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, never requested and the Plaintiff, BURGER KING CORPORATION, never consented, in writing, to the assignment and/or the purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation.

32. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, had in their possession copies of the Burger King Corporation Uniform Franchise Offering Circular approximately four and one-half months prior to their execution of the above-described Franchise Agreement and Lease or Sub-Lease Agreement and that said circular contained copies of the Franchise Agreement and Lease or Sub-Lease Agreement.

33. That Plaintiff, BURGER KING CORPORATION, did not violate the laws of the State of Michigan pertain-

ing to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, assuming, without deciding, that BURGER KING CORPORATION is subject to those laws.

34. That, at the present time, neither Defendant, JOHN RUDZEWICZ or BRIAN MacSHARA, is managing or operating Burger King Restaurant Number 775 on a full-time, day to day basis, in violation of Paragraph 3 of the Franchise Agreement.

35. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, having continued to use the BURGER KING CORPORATION trademarks, tradenames, service marks, methods, and logos, in violation of the above-described Franchise Agreement after proper termination of said Franchise Agreement by Plaintiff, BURGER KING CORPORATION.

36. That it is in the best interests of the consuming public that, at the Plaintiff, BURGER KING CORPORATION's election, either the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, immediately close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to Plaintiff, BURGER KING CORPORATION, for their continued operation of said Burger King Restaurant Number 775.

CONCLUSIONS OF LAW

This Court concludes, as a matter of law, the following:

A. That this Court has jurisdiction over the subject matter and the parties to this cause.

B. That said Franchise Agreement and Lease or Sub-Lease Agreement executed by Defendants, JOHN RUDZE-

WICZ and BRIAN MacSHARA, on June 4, 1979, have been properly terminated by Plaintiff, BURGER KING CORPORATION.

C. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for breach of the Franchise Agreement and Lease or Sub-Lease Agreement, and Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have breached the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979.

D. That as a direct and proximate result of the breach of the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979, by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

E. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for an Open Account.

F. That as a result of the action proven for an Open Account, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

G. That Plaintiff, BURGER KING CORPORATION, has failed to prove the necessary elements of an action for an Account Stated.

H. That said Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are jointly and severally liable to

Plaintiff, BURGER KING CORPORATION, for the above-stated amounts found due and owing to Plaintiff, BURGER KING CORPORATION, in their individual capacities.

I. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove any of the required elements of an action for fraud, misrepresentation, or deceit.

J. That the Franchise Agreement and Lease or Sub-Lease Agreement executed by and between the parties on June 4, 1979, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

K. That any assignment and/or purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation is void as it may pertain to this transaction between the parties and as it may pertain to any amounts found herein to be due and owing to Plaintiff, BURGER KING CORPORATION, from the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA.

L. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their affirmative defenses and in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove that BURGER KING CORPORATION violated the laws of the State of Michigan pertaining to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, assuming, without deciding, that BURGER KING CORPORATION is subject to those laws.

M. That the Defendants, JOHN RUDZEWICZ's and BRIAN MacSHARA's, unauthorized continued use of the BURGER KING CORPORATION trademarks, tradenames, service marks, methods and logos, after proper termination of the Franchise Agreement by the Plaintiff, BURGER KING CORPORATION, constitutes an infringing use of and/or infringement of those properties in violation of the common law rights and statutory rights of the Plaintiff, BURGER KING CORPORATION.

N. That irreparable harm may result to the Plaintiff, BURGER KING CORPORATION, if the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, continue to infringe upon BURGER KING CORPORATION's above-described property rights and at Plaintiff, BURGER KING CORPORATION's, election, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, shall either close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED, as follows:

1. Plaintiff shall submit a Final Judgment, in conformity with these Findings of Fact and Conclusions of Law, within three (3) days of the date of entry of this Order.

2. This Court further reserves jurisdiction of this cause with reference to determining and/or assessing attorneys fees and costs, upon appropriate motion.

3. Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are, at the election of Plaintiff, BURGER KING

CORPORATION, hereby ordered to immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

4. This Court further reserves jurisdiction of this cause with reference to the enforcement of, and/or the compliance with, the provisions of Paragraph 3 above.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 3 day of March, 1982.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

Copies furnished to:

BARRY L. MEADOW, ESQ.
PAUL H. HARTY, ESQ.
THOMAS H. OEMHKE, ESQ.
RICARDO CATA, ESQ.

(Filed March 5, 1982)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

v.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINAL JUDGMENT

THIS CAUSE having come on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, and this Court having entered its Findings of Fact and Conclusions of Law and Order thereon, dated March 3, 1982, and being otherwise fully advised in the premises, it is accordingly

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered in favor of Plaintiff, BURGER KING CORPORATION, and against the Defendants, BRIAN MacSHARA and JOHN RUDZEWICZ, jointly and severally, in the amount of TWO HUNDRED TWENTY-EIGHT THOUSAND EIGHT HUNDRED SEVENTY FIVE DOLLARS AND FORTY CENTS ($228,875.40) for all of which sum let execution issue. Attorneys fees and costs shall be hereinafter taxed.

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered on the Counterclaims filed herein by Defendants/Counterclaimants, in favor of Counterdefendant, BURGER KING CORPORATION, and against-Counterclaimants, BRIAN MacSHARA and JOHN

RUDZEWICZ, who shall take nothing by said Counterclaims.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida on this 5th day of March, 1982.

/s/ James W. Kehoe
U.S. DISTRICT COURT
JUDGE

cc: Barry L. Meadow, Esquire
Ricardo Cata, Esquire
Paul Harty, Esquire
Thomas H. Oehmke, Esquire

(Filed March 22, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5424

BURGER KING CORPORATION,
a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MACSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 13, 11 Cir., 1984, ... F.2d .....). Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

---

*Honorable Virgil Pittman, U. S. District Judge for the Southern District of Alabama, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5424

D.C. Docket No. 81-1145-CIV-K

BURGER KING CORPORATION, a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MACSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court with directions to vacate the judgment and dismiss the case in accordance with the opinion of this Court;

---

*Honorable Virgil Pittman, U. S. District Judge for the Southern District of Alabama, sitting by designation.

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 13, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/ (Illegible) Deputy Clerk

ISSUED AS MANDATE: May 7, 1984.

(Filed May 21, 1984)

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 82-5224

BURGER KING CORPORATION, a Florida corporation,
Plaintiff,

vs.

BRIAN MacSHARA, and JOHN RUDZEWICZ,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that BURGER KING CORPORATION, a Florida corporation, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the decision of the United States Court of Appeals, Eleventh Circuit, entered on the 13th day of February, 1984, and rendered upon denial of rehearing on the 22nd day of March, 1984. The decision reverses the judgment of the United States District Court, Southern District of Florida.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

PODHURST, ORSECK, PARKS,
JOSEFSBERG, EATON, MEADOW
& OLIN, P.A.
25 W. Flagler Street, Suite 1201
Miami, Fla. 33130
(305) 358-2800
Attorneys for Plaintiff

By: /s/ Joel S. Perwin
JOEL S. PERWIN

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 17th day of May, 1984, to: THOMAS H. OEHMKE, ESQ., Oehmke Legal Associates, 517 East Lerned, Detroit, Michigan 48226; PAUL W. HARTY, ESQ., 31300 Orchard Lake Road, Suite 201, Farmington Hills, Michigan 48018; and to SID ROBBINS, ESQ., 7360 North Kendall Drive, Miami, Fla. 33152.

/s/ Joel S. Perwin
JOEL S. PERWIN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Honorable JOSEPH I. BOGART

Case No. 81-1145 CIV-JWK

BURGER KING CORPORATION, a Florida corporation,
Plaintiff,

v.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

Barry L. Meadow
25 West Flagler Street
Suite 1201
Miami, FL 33130

Thomas H. Oehmke
OEHMKE LEGAL ASSOCIATES
517 E. Larned
Detroit, MI 48226

MOTION FOR SUMMARY JUDGMENT AND/OR DISMISSAL AND/OR CHANGE OF VENUE PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, LACK OF SERVICE OF PROCESS, IMPROPER VENUE AND LACK OF JURISDICTION UNDER FEDERAL RULE 12(b)

Request for Oral Argument

NOW COMES the above named defendant, JOHN RUDZEWICZ, Only, by and through his attorneys, OEHMKE LEGAL ASSOCIATES and hereby moves this Court as follows:

1. To dismiss the above stated cause of action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the above stated action or in lieu thereof to quash the return of service of summons on the grounds:

a. That the defendant JOHN RUDZEWICZ is a named resident of the State of Michigan and was not and is not subject to service of process within the Southern District of Florida, and;

b. That the defendant JOHN RUDZEWICZ, has not been properly served with process in this action, all of which more clearly appears in the affidavit of the defendant, JOHN RUDZEWICZ annexed hereto as Exhibit A.

3. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this court is envoked, in part, on the basis of diversity and "long-arm" statute and;

b. The defendant was not present or domiciled in the State of Florida at the time when the purported service of process was made, and;

c. The claim did not arise within this District as is evident from the face of plaintiffs' Complaint and JOHN RUDZEWICZ's Affidavit, annexed hereto as Exhibit A.

4. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this Court is envoked, in part, on the allegation that this case involves a Federal Question;

b. That venue over this matter is controlled by Title 28, Sec. 1391 which provides, in part, that a Civil Action which is not founded solely on diversity of

citizenship can be brought only in the Judicial District where all defendants reside, or in which the claim arose.

5. To dismiss the action on the grounds that the court lacks jurisdiction under Rule 4(e) and (f) of the Federal Rules of Civil Procedure.

This motion is based on the records and files in the entitled cause, and is supported by a brief attached hereto.

Defendant's attorney has requested that plaintiffs' attorney dismiss the above captioned complaint but has been refused.

OEHMKE LEGAL ASSOCIATES

/s/ (Illegible)
Thomas H. Oehmke (P22963)

Dated: 22 June 1981

REQUEST FOR ORAL ARGUMENT

NOW COMES Thomas H. Oehmke, Attorney for Defendant JOHN RUDZEWICZ, and makes a request for an opportunity to make an oral argument on his Motion for Summary Judgment and/or Dismissal and/or Change of Venue Presenting Defenses of Failure to State a Claim, Lack of Service of Process, Improper Venue and Lack of Jurisdiction Under Federal Rule 12(b) because of the complicated issues presented, the sweeping and incorrect allegations of fact—wrongly made in the Complaint—which form the basis for Florida jurisdiction, and the serious economic consequences for Defendant, a Michigan resident, to defend himself in a Florida lawsuit.

/s/ (Illegible)
Thomas H. Oehmke (P22963)

Office - Supreme Court, U.S.
FILED
AUG 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2097

In The

Supreme Court of the United States

October Term, 1983

BURGER KING CORPORATION
a Florida Corporation

Appellant,

vs.

JOHN RUDZEWICZ

Appellee.

On Appeal From
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MOTION TO AFFIRM JUDGMENT

THOMAS H. OEHMKE, Esq.
OEHMKE LEGAL ASSOCIATES
639 Beaubien
Detroit, Michigan 48226
313/963-3525

Counsel for Appellee

19 August 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED FOR REVIEW

No Appeal as of Right Because Florida Statute Not Declared Unconstitutional

1. Whether the Circuit Court declared—as unconstitutional — Sec. 48.193(1)(g) of the Florida Statutes (which confers long-arm jurisdiction upon one who breaches a contract in Florida by failing to perform acts, required by the contract, to be performed in Florida)?

2. Whether the Circuit Court only held that "a Florida court can [not] exercise jurisdiction over a nonresident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Florida"?

No Special or Important Reasons to Grant Writ of Certiorari

3. Whether a Writ of Certioari should be denied because the Circuit Court's decision does not conflict with the decision of another federal court of appeals on the same matter?

4. Whether a Writ of Certiorari should be denied because the Circuit Court's decision does not conflict with any decision of the Florida Supreme Court on the same matter?

5. Whether a Writ of Certiorari should be denied because the Circuit Court's decision has not departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

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MOTION TO AFFIRM JUDGMENT

NOW COMES John Rudzewicz, by his attorney, Thomas H. Oehmke, and moves this Court:

Affirm the Judgment

To affirm the judgment of the Circuit Court (under Rules of Supreme Court 16.1(c)) because it is manifest that the questions (on which the decision of this cause depends) are so unsubstantial as not to need further argument.

In an analogous case on point, and in this very Term, this Court denied certiorari in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*[1]

Finally, the Circuit Court did not declare—as unconstitutional—Sec. 48.193(1) (g) of Florida's long-arm statute.

WHEREFORE, Defendant-Appellee moves this Court to affirm the judgment of the Eleventh Circuit Court of Appeals.

———o———

COUNTER JURISDICTIONAL STATEMENT

Burger King Corporation, a Florida corporation, appeals from the decision of the United States Court of Appeals, Eleventh Circuit, entered on 13 February 1984, and rendered by denial of rehearing of 22 March 1984.

Contrary to Burger King's own jurisdictional statement, no Florida statute was held unconstitutional. Instead, in answering the question:

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(1) 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 2180 (1984).

> . . . whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami, A7

the Circuit Court only held that:

> . . . the circumstances of the . . . franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. *Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process* (emphasis added). Jurisdictional Statement, A17-A18.

Burger King would have this Court wrongly believe that the Circuit Court declared—as unconstitutional—part of the long-arm statute, namely Sec. 48.193(1)(g) of the Florida Statutes. This is a false premise!

In fact, what happened here was an inquiry on Appellee Rudzewicz's motion to dismiss the Complaint for lack of personal jurisdiction. In this inquiry, the facts presented satisfied the requirements of the Florida long-arm statute; however, the exercise of personal jurisdiction was inconsistent with "due process."

Burger King improperly invokes the jurisdiction of this Court under 28 U.S.C. 1254(2). The invocation is improper because the Florida long-arm statute was not held unconstitutional; rather, its application to the facts of this case was inconsistent with due process.

Thus, since no state statute was declared unconstitutional, Burger King may only file a Petition for a Writ of Certiorari—for it has no "appeal as of right."

———o———

SUMMARY OF ARGUMENT

No Appeal as of Right Because Florida Statute Not Declared Unconstitutional

Indeed, 28 U.S.C. Sec. 1254(2) creates a right of direct appeal by any party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution. Yet, that is irrelevant here because there is no "appeal as of right."

Burger King wrongly argues that the Circuit Court "held"—as unconstitutional—Sec. 48.193(1)(g) of Florida's long-arm statute. This is simply false!

The 11th Circuit was testing the *application* of Florida's long-arm statute to Appellee Rudzewicz and, given the lack of sufficient minimum contact with Florida, the *application* of the statute to this defendant, under these particular circumstances, was unconstitutional. In other words, while the long-arm statute passed constitutional muster, its application to Appellee Rudzewicz " . . . would offend the fundamental fairness which is the touchstone of due process." Jurisdictional Statement, A18.[2]

The opinion below was artfully crafted. Certainly, a careful reading reveals no "holding" that this Florida long-arm statute is unconstitutional. Quite differently, the Circuit Court held, "[j]urisdiction *under these circumstances* would offend the fundamental fairness which

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(2) It is instructive that "no court involved in the instant action has certified to the Florida Attorney General the fact that the constitutionality of a Florida Statute is drawn in question" (Jurisdictional Statement, at ii).

is the touchstone of due process." (Jurisdictional Statement, at A18 [emphasis added]).

Because Florida's long-arm statute was not declared unconstitutional, this appeal as of right is not within this Court's jurisdiction. Rules of the Supreme Court, 16.1(a).

No Special or Important Reasons to Grant Writ of Certiorari

No special or important reasons exist to grant a Writ of Certiorari. Thus, according to the Rules of the Supreme Court 17.1(a), Appellant's petition should be dismissed.

The Opinion Below does not conflict with the decision of any other federal court of appeals on the same matter. In fact, each of the five instances when another circuit court has ruled on the same matter, there is agreement with the Opinion Below. This decision below, rendered by the 11th Circuit, agrees with decisions of the 5th Circuit, 6th Circuit, 7th Circuit, and 8th Circuit (Jurisdictional Statement, at 28, n. 48). Thus, five of the 11 circuits are now in agreement on the same matter.

Importantly, this Court's recent denial of certiorari in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra,* should settle this case out-of-hand. While discussed more fully below, *Hydrokinetics* held that the non-resident defendant did not purposefully avail itself of the privilege of conducting business within the forum state, or invoke the benefits and protections of the forum state's laws, so as to warrant the exercise of personal jurisdiction. Because *Hydrokinetics'* factual and legal issues were substantially similar as here, there is no need for review.

The Opinion Below does not conflict with any decision of the Florida Supreme Court on the same matter.

This is because *the Florida Supreme Court has never ruled on the same matter.*[3] Moreover, there is Florida appellate case law (discussed below) to support Appellee's position here.

Finally, the Circuit Court has not departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. To the contrary, the Opinion Below comports with this Court's rulings on "due process" as found in the long litany of personal jurisdiction cases handed down by this Court since 1878 (Jurisdictional Statement, at 16, n. 20).

COUNTER STATEMENT OF THE CASE

Summary

Appellee's agreements with Burger King required rent to be mailed to Miami, Florida, however, the record is void of any proof that even one such payment was made. Other than this obligation to mail such payments, Rudzewicz had absolutely no contacts with Florida.

Burger King argues that the failure of Rudzewicz to mail his monthly payments to Florida constitutes his failure to do an act—which was required to be done—in Florida. Only the Lease/Sublease Agreement (and not the Franchise Agreement) requires that all rent is to be mailed to a post office box, at a general mail facility, in Miami, Florida (Ex 9, paragraph 14.2; Tr 85).

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(3) The only cases Burger King offers to the contrary are five unreported Burger King cases in Miami's federal district court. In the Opinion Below, the 11th Circuit overturned the basis for these five unreported district court decisions. Jurisdictional Statement, 7.

The Florida long-arm statute allows for *in personam* jurisdiction where a non-resident fails to do an act—required by the contract to be done—in Florida. Of course, there must also be the constitutionally-requisite "minimum contacts" between defendant and the forum state.

Appellee Rudzewicz moved to dismiss the Complaint for lack of personal jurisdiction. The District Court denied the motion.[4] Rudzewicz appealed to the 11th Circuit.

In appealing to this Court, Burger King incorrectly argues that the mere failure by Rudzewicz to mail his monthly rent check to Florida supplies sufficient "minimum contact" to invoke personal jurisdiction.

Burger King improperly fashions their Jurisdictional Statement as an "appeal as of right," despite the fact that the Circuit Court never declared the Florida long-arm statute unconstitutional; the Circuit Court let the Florida long-arm statute stand unaffected and held:

> . . . the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process (Jurisdictional Statement, A17-18).

Background

John Rudzewicz and Brian MacShara desired to invest in and operate, respectively, a Burger King restau-

(4) After a bench trial, the Judge entered a judgment ($228,875.40) and awarded attorney fees ($30,000.00) and costs ($2,151.06). With judgment interest, that judgment would have been worth more than $335,000.00 today.

rant. Burger King was aware that Rudzewicz was to be the financial partner (Ex 1; Tr 39), while MacShara was to be the day-to-day operating partner (Exs 1, 11). Burger King granted a 20 year franchise (valued at $45,000.00) to, and entered into a 20 year lease (valued at $1,241,901.00) with Rudzewicz and MacShara (Ex 8, 9).

Franchisees Domiciled, Franchise Operated in Michigan

Franchisees are residents of, and are domiciled in, Michigan (Jurisdictional Statement A23-A24; Tr 39-40, 365, 391) at all times pertinent hereto. Moreover, the franchised business (Store 775) was located and operated in Michigan (Jurisdictional Statement, A24; Tr 85, 392).

All Preliminary Contacts in Michigan

All of the parties' preliminary contacts which related, or gave rise, to jurisdiction occurred in Michigan.

Burger King is a Florida corporation (Jurisdictional Statement, A23) and maintains a district office in Michigan which supervised Store 775 and serviced these franchisees (Exs P, T). The Michigan district office was Burger King's sole representative in dealings with Rudzewicz and MacShara (Jurisdictional Statement, A4).

The Prospectus, affecting this franchise offering, was registered with Michigan's Department of Commerce (Exs M-B, M-C) and mailed to franchisees in Michigan (Ex 21).

The parties' very first discussions about a Burger King restaurant occurred in Michigan in 1977 (Tr 473) and all subsequent meetings and consultations affecting this transaction occurred in Michigan (Tr 506).

Burger King interviewed the prospective franchisees and communicated their approval in Michigan. H.G. Hoffman, the Michigan district manager, evaluated their proposal and wrote them on the company's behalf to convey approval of their franchise application (Jurisdictional Statement, A4). The acceptance letter was mailed from Burger King's Michigan district headquarters to Rudzewicz who was situated in Michigan (Ex 2).

At the conclusion of each round of Michigan negotiations, the Miami office mailed Rudzewicz printed documents for his signature. The documents, once signed, were returned to Burger King headquarters in Miami for completion. Following corporate approval, headquarters then mailed to Rudzewicz copies of the completed documents for his files (Jurisdictional Statement, A4).

Neither franchisee ever went to Florida to execute any agreement whatsoever (Tr 201, 220), nor was any part of the franchised restaurant business ever conducted by franchisees in Florida. In fact, franchisee Rudzewicz has never set foot in Florida to transact any business with respect to Burger King or this franchise.

Franchise Offer Made/Accepted in Michigan

The "offer" of this particular franchise was in the form of the Preliminary Agreement (Ex 3), which was sent to franchisees who were in Michigan (Ex 4). Subsequent requests made by Burger King for Franchisees to execute this Preliminary Agreement were mailed to Michigan (Exs 5, 6); ultimately, it was executed by franchisees and returned to Burger King. In turn, Burger King accepted that "offer," by executing it, and communicated this acceptance to franchisees who were in Michigan (Ex 7).

The "offer" by Burger King of the Franchise Agreement (Ex 8) and the Lease/Sublease Agreement (Ex 9) was sent to franchisees in Michigan (Tr 22-23, 202) for them to sign in Michigan (Tr 201, 220). In fact, franchisee Rudzewicz executed these documents at a Michigan closing ceremony attended by employees of the Michigan district office (Tr 365, Jurisdictional Statement, A4) and returned them to Burger King with the $45,000.00 consideration (Ex 10) on June 4th. After their execution by Burger King, this acceptance by Burger King was communicated to franchisees in Michigan as the two Agreements (Exs 8, 9) were returned to franchisees in Michigan (Ex K; Tr 314) MCL 445.1504 (2), (3).

Continuous and Systematic Business in Michigan

Franchisee Rudzewicz purchased supplies and equipment from the Michigan offices of Burger King's Distron and Davmor Divisions; in exchange, payment was mailed to Burger King's district office in Michigan (Ex M-A; Tr 156).

The $45,000.00 consideration for the franchise fee and the site development fee was drawn on and certified by a Michigan bank (*viz.*, Michigan National Bank) and conveyed to Burger King's Michigan district representatives at the closing in Michigan, upon the execution of the Franchise and Lease/Sublease Agreements (Ex 10).

All notices of delinquency, default, and termination were sent to franchisees who were in Michigan (Exs A, B, E, F, G, J, V, M-F, M-l, 17, 18 and 19).

No Continuous and Systematic Business in Florida

Franchisees did not have a place of business in Florida, nor were they ever licensed or authorized (as a

corporation, partnership, or under an assumed name) to do business in Florida; franchisees never had an agent for the service of process in Florida. Franchisee Rudzewicz never performed any act in Florida related to Burger King, never provided a related service in, or sold a related product that reached, Florida. Franchisees never signed any agreement in Florida, never had any employee based in Florida, and never recruited any employee from Florida. In addition, Franchisees never owned any real property in Florida, never maintained any office or establishment there, and never maintained any business records in Florida.

Appellee carried on no continuous or systematic general business in Florida.

The sole "contact" Rudzewicz had with Florida was a non-negotiable obligation, unilaterally imposed on him by Burger King, to mail monthly payments to Florida (rather than mailing them to Burger King's Michigan district office).

Franchisee did not purposefully avail himself of any benefit or obligation in Florida, other than to sign, in Michigan, a non-negotiable, boiler plate Franchise Agreement which contained a Florida "governing law" (though no "choice of forum") provision.

Franchisee did not take advantage of the economic benefits and opportunities offered by Florida.

Florida was not significantly affected by Appellee's franchise activities; no taxes were paid in Florida and no employees were located there.

ARGUMENT

Burger King's Policy Objective

Let us be blunt about what Burger King is attempting to undo by this appeal. Burger King wants to sue all franchisees—not where those franchisees are found but, rather, in Miami. In headlong pursuit of this policy, motivated solely by self-interest, Burger King sues everyone in Florida.

In furtherance of this self-centered policy, Burger King even has sued a Hawaii corporation in Florida. Burger King boldly alleged a breach of contract because payment was not made " . . . on a shipment originating in California and delivered in Hawaii with payment to be made to a California address."[5-6] Burger King unsuccessfully argued that the proper forum state was Florida (where Burger King resides).

As with this Hawaiian defendant, it is eminently unfair and unreasonable to subject franchisees—like Rudzewicz—to suit in Florida where they have no significant contacts that are directly related to the underlying cause of action.

Burger King does not conceal its policy objective in this case. Since 1978, Burger King has sued its franchisees in U.S. District Court, Southern Division at Miami, Florida, rather than where they are domiciled (Jurisdictional Statement, A21). Burger King makes no pretext about this constitutionally brash appeal. Incredulously, Burger King has the unmitigated gall to instruct this Court:

(5-6) *Burger King Corporation, d/b/a Distron v. CPM&F, Inc.*, 537 F.Supp. 651, 652 (S.D. Fla. 1982).

> . . . it should be noted that Mr. Rudzewicz was no less inconvenienced by the necessity of litigating in Florida than would Burger King be inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. At best, this consideration is a standoff (Jurisdictional Statement, 27).

Burger King can charge sufficient royalties to finance potential litigation in the states where its franchises are located. Conversely, the franchisee has no power to negotiate a reduced royalty to finance a defense if sued in Florida.

The 11th Circuit was cognizant of the consequences for other franchisees if Burger King were not sandwiched into a more equitable position. The 11th Circuit was:

> . . . troubled by elements of surprise which, if sanctioned, could ultimately sow the seeds of default judgments against franchisees owing smaller debts (Jurisdictional Statement, A-13).

In Burger King's multinational, corporate opinion:

> [t]his case may determine whether [Burger King] must litigate not under a coherent set of [Florida] laws enforced in [Florida]—but wherever a *disputatious franchisee* may reside (Jurisdictional Statement 15, emphasis added).

Yet, it was the threat of this very abuse, this prostitution of due process and the "minimum contacts" requirements, that has spurred the enactment of the Michigan Franchise Investment Act. The 11th Circuit also noted that "[i]n recent years, certain states have moved to enact statutes to police the more flagrant excesses of franchises. Annot, 67 A.L.R.3d 1299, 1301" (Jurisdictional Statement, A16).

Therefore, by this appeal, Burger King arrogantly attempts to attenuate the due process protections of the

Constitution in their relations with their franchisees throughout the country. Burger King's corporate legal policy, as regards suits against its franchisees, is simply this: regardless of the lack of "minimum contacts," sue them in Miami, not where they are found.

While Burger King nationally advertises that you can "Have it your way," when it comes to *in personam jurisdiction,* Burger King prefers to have it their way—in Florida.

———o———

NO APPEAL AS OF RIGHT BECAUSE FLORIDA STATUTE NOT DECLARED UNCONSTITUTIONAL

Constitutionality of Statute Unaffected

The Circuit Court never declared—as unconstitutional—Sec. 48.193(1)(g) of the Florida Statutes (which confers long-arm jurisdiction upon one who breaches a contract in Florida by failing to perform acts, required by the contract, to be performed in Florida).

Plain and simple: no where in the Opinion Below did the Circuit Court declare the Florida long-arm statute unconstitutional. Burger King engages in a process of intellectual self-deception by suggesting that the 11th Circuit nullified that Florida long-arm statute. It didn't happen; that statute remains intact.

Quite clearly, the constitutional prerequisite to the exercise of personal jurisdiction is to assure that the defendant has "minimum contacts" with the forum state. Thus, provided that there are the statutorily required "minimum contacts" in Florida, that state's long-arm statute is still operative.

The provision of the Florida long-arm statute in question here is one that vests *in personam* jurisdiction where the non-resident defendant fails to do an act, required to have been done, in Florida. There is nothing unconstitutional *per se* about such a provision.

There are still acts which, if not done in Florida, may invoke personal jurisdiction under Florida's long-arm statute. For example, given constitutionally-mandated "minimum contacts," there is personal jurisdiction under Florida's long-arm statute where there is a failure by a non-resident defendant, under the terms of a contract, to provide prepaid services in Florida[7] or honor a guarantee of a Florida contract.[8]

The reach of Florida's long-arm statute is a question of state law. Correspondingly, federal courts are required to accept the interpretation given that statute by the state's supreme court. Nonetheless, the federal courts are not only permitted, but mandated, to determine the extent to which the reach of Florida's long-arm statute is limited by constitutional due process.[9]

Thus, here the 11th Circuit did not declare that particular Florida long-arm statute unconstitutional. Rather, it only held that the circumstances under which Rudzewicz was forced to defend himself " . . . would offend the fundamental fairness which is the touchstone of due process." Therefore, Burger King has no "appeal as of right."

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(7) See *Lacy v. Force V Corporation*, 403 So.2d 1050 (Fla. 1st D.C.A. 1981).

(8) See *Horace v. American National Bank and Trust Company*, 251 So.2d 33 (Fla.D.C.A. 1971).

(9) *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982).

Court Only Held "No Minimum Contacts" Here

> **The Circuit Court only held that "a Florida court can [not] exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Florida."**

Burger King here obliquely attempts to pull the proverbial wool over this Court's judicial eyes. Burger King falsely characterizes 10 major state court "holdings" as supporting its untenable position. Appellant argues that there are " . . . numerous state decisions holding that the contractual obligation to make payment in the forum state is a form of doing business . . . " (Jurisdictional Statement, 14-15).

In truth, not one of these decisions holds that a non-resident's failure to mail a check to the forum state—standing alone—is singularly sufficient to constitute "doing business" and, consequently, to subject that non-resident to personal jurisdiction. Only Florida cases support this absurb prostitution of constitutional due process protections. Furthermore, despite Burger King's arduous attempt to show what constitutes "doing business" in the state of Florida, it has lost sight of the issue in this appeal:

> Whether breaching a contract by failing to make a payment by mail to its offices in Florida constitutes sufficient "minimum contacts" with the state to warrant *in personam* jurisdiction over the defendant?

In considering the validity of the "breached contract" portion of Florida's "long arm" statute Florida's Third District Court of Appeals (although noting its disagreement) remarked about "minimum contacts" in the state, as provided by Section 48.193(1)(g) of the Florida Statutes, that:

> Federal court review of Section 48.193(1)(g), alone, as a sole basis for jurisdiction over a nonresident has been limited, but *Poston v. American President Lines, Ltd.*, 452 F.Supp. 568 (S.D.Fla. 1978), seems to agree with the Second District's holding in *Lakewood Pipe*, [379 So.2d 475 (Fla. 2d D.C.A. 1979)] and *Osborn v. University Society, Inc.* [378 So.2d 873 (Fla. 2d D.C.A. 1979)], that *constitutional requirements are not met by relying solely on Section 48.193(1)(g)*, Florida Statutes (emphasis added).[10]

No doubt, the reach of a state's long-arm statute is a question of state law. Indisputably, federal courts are required to accept interpretation given a long-arm statute by a state's supreme court. However, the extent to which the reach of the long-arm statute is limited by constitutional "due process" is a question of federal law. This necessitates an inquiry by the federal court into the facts forming a basis for personal jurisdiction.

The inquiry is two-part: first, whether the facts presented satisfy the requirements of the state's long-arm statute; and, second, whether the exercise of personal jurisdiction is consistent with federal constitutional due process.[11]

Here, Defendant Rudzewicz may well have met the literal requirements of the Florida long-arm statute; however, there were no "minimum contacts" in the state of Florida to satisfy federal due process requirements.

Thus, since both tests must be met, and because Rudzewicz lacked "minimum contacts," there is no jurisdiction. By application—not by construction—this Florida statute

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(10) *Engineered Storage* v. *National Partitions*, 415 So.2d 114, 115 n.3 (Fla. 3d D.C.A. 1982).

(11) *Scullin, supra*, at 312.

cannot be constitutionally applied to Rudzewicz by the federal district court in Florida.

NO SPECIAL OR IMPORTANT REASONS TO GRANT WRIT OF CERTIORARI

No Conflict Among Federal Circuits

The Writ of Certiorari should be denied because the Circuit Court's decision does not conflict with the decision of another federal court of appeals on the same matter.

Burger King frankly concedes that, in addition to the decision it lost before the 11th Circuit, there are four more circuit court cases (cited below) having ". . . decisions consistent with the [Eleventh] circuit court's decision in this case" (see Jurisdictional Statement at 28, n. 48). Because Burger King agrees that these are the four other relevant and material circuit court holdings—each of which is contrary to the position that Burger King argues before this Court—it is important to explore these four circuit court cases, noting particularly the recent denial of *certiorari* in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra.*

Historically, there is an expansive body of law on "minimum contacts" beginning with *Pennoyer v. Neff*,[12] and through the post World War II era, continuing with the 1945 decision in *International Shoe Co. v. Washington*;[13] *McGee v. International Life Ins. Co.*;[14] *Hanson v.*

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(12) 95 U.S. 714 (1878).

(13) 326 U.S. 310 (1945).

(14) 355 U.S. 220 (1957).

Denckla;[15] *Shaffer v. Heitner;*[16] *Kaulko v. Superior Court of California;*[17] *World-Wide Volkswagen Corp. v. Woodson.*[18]

Moreover, since 1974, a total of five circuit courts have ruled on the very issue now before this Court. Not surprisingly, there is unanimity—and no conflict—on this personal jurisdiction issue among the 5th, 6th, 7th, 8th, and 11th Circuits.

8th Circuit Court of Appeals

In *Scullin Steel Co. v. National Railway Utilization Corp., supra,* the trial court dismissed a Complaint for lack of personal jurisdiction. Scullin Steel unsuccessfully protested, arguing that, because all payments were sent to Scullin Steel in the forum state (Missouri) by the non-resident Defendant (in Pennsylvania), that there were "minimum contacts" to support personal jurisdiction. To the contrary, the 8th Circuit held that:

> the use of interstate facilities (telephone, the mail), [and] the making of payments in the forum state . . . are secondary or ancillary factors and cannot alone provide the "minimum contacts" required by due process. *See . . . Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.,* 558 F.2d at 453 (use of facilities of interstate commerce); *McQuay, Inc. v. Samuel Schlosberg, Inc.,* 321 F.2d 902, 905-06 (D.Minn. 1971) (payment within forum).

Id. at 314.

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(15) 357 U.S. 235 (1958).

(16) 433 U.S. 186 (1977).

(17) 436 U.S. 84 (1978).

(18) 444 U.S. 286 (1980).

If the 8th Circuit was confronted with the Burger King case, like *Scullin Steel,* it too would have dismissed the Complaint for lack of personal jurisdiction.

7th Circuit Court of Appeals

In *Telco Leasing, Inc. v. Marshall County Hospital,*[19] there were similar facts, as in *Scullin Steel.* Again, the trial court dismissed the complaint for lack of personal jurisdiction; the 7th Circuit affirmed the dismissal.

Telco Leasing, an Illinois lessor, attempted to obtain personal jurisdiction over a non-resident lessee, a Mississippi hospital, by claiming that "minimum contacts" were established by the non-resident's causing rental payments to be delivered to Plaintiff in the forum state, and the fact that Defendant signed a lease (while outside of the forum state) which provided that the lease would be binding ". . . when accepted by Lessor in the State of Illinois . . .," as well as various written and telephone communications, made by the non-resident Defendant to Plaintiff's offices in the forum state, *Id.* at 51. The trial court dismissed the complaint for lack of personal jurisdiction.

Quoting from another Seventh Circuit case, the trial court proclaimed:

> Whether or not there are sufficient minimum contacts to comport with due process cannot be determined by any set formula or rule of thumb, but must rest on a consideration of what is fair and reasonable in the circumstances of each particular case. *Hutter Northern Trust v. Door County Chamber of Commerce,* 403 F.2d 481 (7th Cir. 1968).

Id. at 50.

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(19) 586 F.2d 49 (7th Cir. 1973) (1878).

Like Burger King, Telco Leasing unsuccessfully contended that their boiler-plate, form lease established personal jurisdiction over the non-resident defendant since:

> . . . the contract is accepted in Illinois by the plaintiff corporation, and the non-resident defendant executes the form leases outside of Illinois and, pursuant to the leases, causes rental payments to be mailed to plaintiff's Illinois offices over a period of two years, the non-resident defendant can be said to have "transacted business" in Illinois and to have had "minimum contacts" with the State of Illinois. . . .

Id. at 51.

Unequivocally, 7th Circuit Court held that Telco Leasing could not assert any personal jurisdiction in Illinois over the Mississippi hospital defendant by finding:

> . . . it is not the terms of the lease that are controlling, but all the facts and circumstances of the transaction, for it is from the total picture that we determine whether or not the exertion of jurisdiction would comport with the notions of fair play and substantial justice.

Id. at 52.

If the 7th Circuit were confronted with the Burger King case, like *Telco Leasing*, it too would have dismissed the Complaint for lack of personal jurisdiction.

5th Circuit Court of Appeals

Similarly, in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra*, the 5th Circuit Court of Appeals affirmed the dismissal of the Complaint, filed in Texas against a non-resident, Alaska buyer. The 5th Circuit held that the Alaska firm did not purposefully avail itself of the privilege of conducting business within Texas or invoke the benefits and protections of Texas law so as to warrant

exercise of personal jurisdiction. The Alaska firm merely purchased equipment from a Texas firm to be shipped to the Klondike.

The facts in *Hydrokinetics* revealed that the contract negotiations were conducted by telex, telephone, and letter. Also, while negotiations were underway, two officers of the Alaska, non-resident buyer visited the seller's plant in Texas to inspect the equipment and facilities.

In dismissing the Complaint, the trial court concluded that "the Defendant never made any calculated effort to engage in or solicit business in Texas with a Texas company nor had any expectation of extracting profits." *Id.* at 1027-1028. While the dissenting judge disagreed with the majority's facts, he quoted from *Mississippi Interstate Express, Inc. v. Transpo, Inc.*:[20]

> When a nonresident defendant takes "purposeful and affirmative action," the effect of which is to "cause business activity, foreseeable by [the defendant], in the forum state," such action by the defendant is considered a "minimum contact" for jurisdictional purposes. *Marathon Metallic Building Co. v. Mountain Empire Construction Co.*, 653 F.2d 921, 923 (5th Cir. 1981). "When a defendant purposefully avails himself of the benefits and protection of the forum's laws —by engaging in activity . . . outside the state that has reasonably foreseeable consequences in the state —maintenance of the lawsuit does not offend traditional notions of fair play and substantial justice." *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1268 (5th Cir. 1981).

Id. at 1032.

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(20) 681 F.2d 1003, 1007 (5th Cir. 1982).

If the 5th Circuit were confronted with the Burger King case, like *Hydrokinetics,* it too would have dismissed the Complaint for lack of personal jurisdiction.

6th Circuit Court of Appeals

In *Weller v. Cromwell Oil Co.,*[21] the facts parallelled those in the Burger King case. Like ships passing in the night, there were some tangential contacts between the California-based, non-resident defendants and the Ohio-based plaintiff. However, these tangential contacts were only by mail and telephone. Indeed, the mail was sent from California and the telephone calls were made from there.

The 6th Circuit, as did the District of Columbia Appeals Court, refused to "delve into a magical mystery tour of 'projecting presences.'" *Id.* at 930. The Sixth Circuit Court held that Ohio could not assert personal jurisdiction over the non-resident defendants.

These non-residents were California residents; they were served with process in California; they were never in Ohio to commit any act or omission; there was no evidence that any agent of these non-residents was in Ohio to negotiate this contract; the telephone calls were made, and the correspondence mailed, from California.

As with Burger King, the *Weller* court held that mere contacts by mail or telephone do not confer personal jurisdiction upon a non-resident under the "transacting business" clause of a state's long-arm statute. Simply, Weller did not meet his burden of proof:

> The burden of proof to establish jurisdiction over the individuals was upon the plaintiff. *McNutt v.*

(21) 504 F.2d 927 (6th Cir. 1974).

> *General Motors Acceptance Corp.,* 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *Schuckman v. Rudenstein,* 164 F.2d 952 (6th Cir. 1947).

Id. at 314.

As with *Weller,* neither did Burger King meet its burden of proof. Burger King could only establish that the most miniscule qualitative contact—an obligation for Rudzewicz to have mailed to Florida his payments. In fact, Burger King did not establish that one such payment was ever received, despite the obligation.

If the 6th Circuit were confronted with the Burger King case, like *Weller,* it too would have dismissed the Complaint for lack of personal jurisdiction.

Unanimity Among Circuits that have Decided

Since there is no conflict among the circuits which have ruled on this same matter, and because of the recent denial of *certiorari* by this Court in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra,* there is no special or important reason to grant the Writ of Certiorari here.

No Conflict with Florida Supreme Court

The Writ of Certiorari should be denied because the Circuit Court's decision does not conflict with the decision of the Florida Supreme Court on the same matter.

The Florida Supreme Court has never decided the same matter as presented here. As "Florida precedent," Burger King has only produced federal decisions—where it was the plaintiff—from the United States District Court for the Southern District of Florida. Significantly, the 11th Circuit has overturned that so-called "Florida precedent."

In fact, the Florida state court is sympathetic to the constitutional "minimum contacts" test. In *Osborn v. University Society, Inc.,*[22] the Florida appellate court held:

> under a given factual situation, even though a nonresident may appear to fall within wording of the long-arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state.

Subsequently, the Florida Appeals Court held that a contractual obligation standing alone, which requires payment to be made to a creditor in Florida, was not enough to meet the "minimum contacts" standard. *Lakewood Pipe of Texas, Inc. v. Rubaii.*[23]

In the only statement made by the highest court of the state, although dealing with a product liability action rather than a breach of contract action, the Florida Supreme Court reasoned, in determining when sufficient "minimum contact" had been made with the forum state:

> The inquiry into whether there are "minimum contacts" between the forum state and a nonresident business enterprise must look at the nature of the defendant's activities in the state. Continuous and systematic activities provide a reasonable basis for the assertion of jurisdiction.

Ford Motor Company v. Atwood Vacuum Machine Company.[24] Moreover, in circumstances in which "continuous and systematic activities" with the forum state were not established, the court, in citing *International Shoe,* found:

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(22) 378 So.2d 873, 874 (Fla. 2d D.C.A. 1979).

(23) 379 So.2d 475 (Fla. 2d D.C.A. 1979).

(24) 392 So.2d 1305, 1310 (Fla. 1981).

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. The clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

Id., at 1310.

In further elaboration on the Florida Supreme Court's decision, a Florida appeals court (1st D.C.A.) determined:

> Unquestionably the single most important factor to be considered is whether "the defendant's conduct and connection with the forum . . . are such that he should reasonably anticipate being haled into court there . . . ." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 297. *It is essential that this circumstance be considered from the perspective of the defendant—not from that of the plaintiff* (emphasis added)

Lacy v. Force V Corporation, supra, at 1054.

The Florida Supreme Court, as well as the various Appellate Courts, all require, in the absence of "continuous and systematic activity" within the state, such contact with the state must comport with the "fundamental fairness" precept provided by *Pennoyer, supra.*

The Florida Supreme Court has adopted the reasoning of this Court in a manner that reflects the intent and purpose of the protections provided by the Due Process Clause of the Fourteenth Amendment:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson v Denckla,* 357 U.S., at 253 . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by

procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Ford Motor Co. v. Atwood Vacuum Machine Co.[25]

The state court of last resort (*viz.*, the Florida Supreme Court) has not ruled on this specific matter. Thus, no conflict exists between the federal district court's interpretation of this Florida statute, as compared to the Florida appellate courts' interpretation. Consequently, there is no special or important reason to grant the Writ of Certiorari here.

No Radical Departure

The Writ of Certiorari should be denied because the Circuit Court has not departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Burger King cites an inaction by Rudzewicz as the basis for a "minimum contact."

The judicial history of the constitutional interpretation of the Due Process Clause of the Fourteenth Amendment is replete with instances in which requirements of "minimum contact" have been met, as well as instances where the requirements were not. This court has found that personal jurisdiction exists when a corporation "purposefully avails itself of the privilege of conducting activities within the forum state," *Hanson v. Denckla, supra,* at 253. A person's minimum contacts with the forum state must assure that suit there does not offend

(25) 392 So.2d 1305, 1311 (Fla. 1981).

"traditional notions of fair play and substantial justice," *Milliken v. Meyer,* 311 U.S. 457, 463 (1940).

The decision of the Eleventh Circuit has not departed from the accepted and usual course of judicial proceedings, as established by this court or the Florida Supreme Court, so as to warrant *certiorari.*

As discussed above, any contact that Rudzewicz may have had with the forum state was minimal, at best, and certainly not enough to satisfy the requirements of this Court for "minimum contact" sufficient to establish personal jurisdiction over the defendant.

Burger King fantasizes a "parade of horrors" argument, in its attempt to wrangle out a writ of certiorari where no "appeal as of right" exists. Burger King exaggerates, in its Jurisdictional Statement (at 15), that the 11th Circuit opinion "implicates the 'doing business' legislation of almost every state." However, the "doing business" legislation of Florida and every other state is not at issue here, rather, it is the issue of requisite "minimum contact" with the forum state which will assure that personal jurisdiction over the defendant will not ". . . offend the fundamental fairness which is the touchstone of due process." Jurisdictional statement, A18.

CONCLUSION

It is clear from the record below, as well as the Eleventh Circuit's decision that:

A. Subsection "g" (48.193(1)(g)) of the Florida "long arm" statute was never held "unconstitutional."

B. The Eleventh Circuit Court of Appeals ruled that the Florida Statute's application to these particular circumstances violated Rudzewicz's constitutional right to due process.

C. The Eleventh Circuit has not ruled inconsistent with any ruling of the Florida Supreme Court on the issue.

D. The rulings of the various Florida Court's of Appeal are consistent with the ruling of the Eleventh Circuit.

E. There are no Federal decisions which are contrary to the decision of the Eleventh Circuit; in fact, the recent denial of *certiorari* in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra* begs a similar denial of *certiorari* here.

———o———

RELIEF

Affirm the Judgment

It is manifest that the questions, on which the decision of this cause depend, are so unsubstantial as not to need further argument. Therefore, this Court should affirm the judgment of the Circuit Court.

Deny Writ of Certiorari

Finally, there are no special or important reasons to grant a Writ of Certiorari.

The Opinion Below does not conflict with the decision of another federal court of appeals on the same matter;

neither does the decision conflict with a decision of the Florida Supreme Court on the same matter; nor has the decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Therefore, this Court should not set this case for argument and, instead, should deny certiorari.

Respectfully submitted, August 19, 1984

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With Lawrence J. Johnson, Esq.
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APPENDIX

Appellee incorporates by reference the Appendix to Appellant's Jurisdictional Statement.

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No. 83-2097

In the Supreme Court of the United States

October Term, 1984

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CIRCUIT COURT ERRED IN HOLDING UNCONSTITUTIONAL, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT DUE-PROCESS CLAUSE, SECTION 48.193(1)(g) OF THE FLORIDA STATUTES, WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA.

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No. 83-2097

In the Supreme Court of the United States

October Term, 1984

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT

RESPONSE TO MOTION TO AFFIRM JUDGMENT

Appellant Burger King Corporation[1] respectfully offers the following response to the appellee's Motion to Affirm Judgment. Because that motion ignores almost all of the arguments and authorities offered in our Jurisdictional Statement, we will rely primarily upon that statement, and not reassert unrebutted points. We do wish to make the following points in specific reaction to the appellee's motion:

1. The appellee (hereinafter "Mr. Rudzewicz") has effectively conceded that this Court has jurisdiction by direct appeal under 28 U.S.C. §1254(2). As the circuit

1. Burger King Corporation is a wholly-owned subsidiary of the Pillsbury Company, with no subsidiaries or affiliates.

court noted in its opinion, Mr. Rudzewicz conceded at trial that his activities in this case "fall within the reach of the Florida long-arm statute, Fla. Stat. §48.193(1)(g)" (A7).[2] Likewise in his motion (p. 2), Mr. Rudzewicz acknowledges that "the facts presented satisfy the requirements of the Florida long-arm statute . . . ."[3] In this context, Mr. Rudzewicz argues (motion at 3) that "[t]he 11th Circuit was testing the *application* of [the statute] . . ."; and "the *application* of the statute to this defendant, under these particular circumstances, was unconstitutional" (emphasis in original). That is a correct statement of the circuit court's holding; as we note in our Jurisdictional Statement (p. 11), §1254(2) creates a right of direct appeal of any decision holding a state statute to be repugnant to the Constitution, whether the statute is declared invalid on its face, or as applied.[4] We agree entirely with Mr. Rudzewicz' statement of the circuit court's holding (motion at 16-17): "By application—not by construction—the Florida statute cannot be constitutionally applied to Rudzewicz by the federal district court in Florida." Both parties now agree that the trial court declared the statute unconstitutional as applied.

2. These concessions notwithstanding, Mr. Rudzewicz suggests (motion at 24-25) that the statute should be construed to include an implicit constitutional qualifier. We address this point at pages 8-11 of our Jurisdictional Statement, acknowledging that there are a handful of Florida

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2. "A" refers to the Appendix to Burger King's Jurisdictional Statement.

3. Later in his motion (p. 16), Mr. Rudzewicz says: "Here, Defendant Rudzewicz may well have met the literal requirements of the Florida long-arm statute . . . ."

4. *New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976) (per curiam); *Dutton v. Evans*, 400 U.S. 74, 76 n.6 (1970) (separate opinion announcing judgment). See also the other cases cited in footnote 16, p. 11, of our Jurisdictional Statement.

decisions which agree. In light of the statute's plain language, however, the clear majority of Florida decisions construes this statute to mean exactly what it says—that long-arm jurisdiction is conferred *whenever* a non-resident fails "to perform acts required by the contract to be performed in this state." Thus we cited four Florida decisions expressly holding that the failure to pay money due in Florida is enough to confer jurisdiction under the statute, and another four which enforce the statute under identical circumstances. Jurisdictional Statement at 10-11 nn.12-14. As the court said in *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 n.3 (Fla. 3rd DCA 1982): "A reading of the statute to require the doing of more than one of the enumerated acts, even for the limited purpose of avoiding a perceived constitutional problem, would be strained." The court continued: "The statute plainly states that by doing any one of the acts enumerated, a non-resident person submits to the jurisdiction of the courts of this state for a cause of action arising from the doing of one of those acts." *Id.* at 114. Notwithstanding a few appellate decisions to the contrary—all but one of them from a single appellate district—the overwhelming majority of Florida decisions construes §48.193(1)(g) to mean precisely what it says.

Moreover, we respectfully submit that Mr. Rudzewicz is now estopped to take a contrary position. As the circuit court held in its opinion (A. 6-7): "Although Rudzewicz concedes that his activities fall within the reach of the Florida long-arm statute, Fla. Stat. §48.193(1)(g), he argues that invocation of that statute under these circumstances exceeds the bounds of due process." Before the circuit court, Mr. Rudzewicz argued *not* that the statute should be construed to avoid the perceived constitutional infirmity, but that "invocation of that statute" was im-

permissible *despite* the fact "that his activities fall within [its] reach . . . ." Having made that concession below, Mr. Rudzewicz is now estopped to take a contrary position before this Court.[5]

3. Regarding the jurisdictional facts of this case, Mr. Rudzewicz argues (motion at 5) that the record is "void" of any proof that the franchisees in this case in fact made rent payments to Burger King in Miami. But Mr. Rudzewicz conceded precisely the opposite in his brief before the circuit court (p. 6): "The Lease/Sublease Agreement (not the Franchise Agreement) does require that all rent is to be mailed to a post office box, at a general mail facility, in Miami, Florida (EX. 9, ¶ 14.2; Tr. 85). Franchisees made but only one or two of their rent payments for Store #775." Under the authority cited in footnote 5, *supra*, Mr. Rudzewicz is now estopped to claim otherwise. Moreover, Mr. Rudzewicz' belated assertion is flatly incorrect. Burger King offered direct evidence that the franchisees did make payments to Burger King in Miami of advertising costs, real estate taxes, rent, and supply costs (Tr. 90-92). Mr. Rudzewicz' counsel responded: "We will stipulate to the accuracy of the statements" (Tr. 92); and the witness' itemized list of payments and amounts due was introduced as PX. 20 (Tr. 93).

4. Finally (motion at 17-23), Mr. Rudzewicz makes the incredible assertion that "there is no conflict among

5. *See, e.g., Hughes Masonry Co. v. Greater Clark County School Building*, 659 F.2d 836, 838-39 (7th Cir. 1981); *Douglas v. United States*, 658 F.2d 445, 449 (6th Cir. 1981); *In Re Double D Dredging Co.*, 467 F.2d 468, 469 (5th Cir. 1972); *Smith v. United States*, 466 F.2d 535 (6th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *United States v. Webber*, 396 F.2d 381, 389 (3rd Cir. 1968). *See generally* 1B Moore's Federal Practice §0.405[8], at 238-47 (2nd ed. 1983) (and cases cited); Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946).

the circuits" (motion at 23) on the substantive question before the Court, because of four appellate decisions which appear supportive of the circuit court's reasoning in this case. These four decisions were acknowledged in our initial brief as contrary authority (p. 28 n.48), and we think it significant that Mr. Rudzewicz has been able to come up with no additional authority in support of his position.[6]

6. We did not intend by acknowledging these decisions to suggest that any of them would necessarily be *dispositive* of the instant case—but only suggestive of the circuit court's approach in this case. Obviously the facts of every case are different. For example, no less than seven times in his motion, Mr. Rudzewicz finds it appropriate to cite the decision in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S. Ct. 2180 (1984). Admittedly, some of the facts in *Hydrokinetics* were more favorable to the exercise of jurisdiction than the facts of this case—for example, the fact that the defendant's representatives in *Hydrokinetics* had actually traveled to Texas to close the deal. But other facts are far weaker—for example, the fact that "only a single transaction is involved in this case, governed by Alaska law, which is the defendant's sole contact with the forum state [Texas]." 700 F.2d at 1029. In the instant case we have not a single transaction, but a business relationship involving ongoing payments; and we also have a contract requiring application of the forum's substantive law. That difference is significant, and thus, while we agree that the *Hydrokinetics* decision tends to support the circuit court's reasoning in this case, we by no means find it dispositive.

To this list of cases supporting the circuit court's reasoning in this case should *not* be added the decision in *Burger King Corp. v. CPM&F, Inc.*, 537 F. Supp. 651 (S.D. Fla. 1982), which Mr. Rudzewicz cites at page 11 of his motion. In that case the contract was made between Burger King's Distron division—which supplies Burger King products to franchises—and a Hawaii corporation which planned to wholesale such products to Burger King franchises in Hawaii. Because the contract in question specifically called for payments by the Hawaii corporation to be made *not* to Burger King in Florida but rather to a California address, the district court found that §48.193(1)(g) was not applicable, and thus never considered the constitutionality of that statute: "Therefore, although F.S. §48.193(1)(g) confers jurisdiction over any person who breaches a contract in this state by failing to perform acts required in this state, the Plaintiff has not shown to this Court any act which was required to be performed in Florida by the Defendant." *Id.* at 652. That case has nothing to do with this one.

We acknowledged these decisions to emphasize the unsettled nature of this question, and the importance of its resolution by this Court. In our initial brief (p. 18 n.27), we cited ten federal decisions upholding statutes analogous to the Florida statute here; and another thirteen federal decisions under facts analogous to those here, which upheld the exercise of long-arm jurisdiction under "doing business" statutes. To establish his incredible claim of unanimity among the circuits, Mr. Rudzewicz was required to deal with these cases—not with four isolated cases offered to him by the appellant in full disclosure. We think it enormously significant that in all of his motion, Mr. Rudzewicz has failed to acknowledge or address any of the cases which conflict with the circuit court's reasoning in this case.

The appellant respectfully submits that Mr. Rudzewicz has said nothing in his motion to forestall the conclusion that the circuit court in this case did declare the Florida statute unconstitutional. By its plain language, that statute clearly reaches the contract at issue in this case, and that language does not lend itself to a construction embracing a constitutional qualifier. Mr. Rudzewicz has conceded that throughout this litigation, and is estopped to take a contrary position at this stage of the proceedings. Moreover, the circuit court's decision only adds to the inter-circuit conflict on this question. There are dozens of decisions which counsel a different outcome in this case—dozens of state statutes and rules which are implicated—dozens of extant franchise relationships affected. The circuit court's opinion is far-reaching, and wrong.

CONCLUSION

For the reasons provided above, it is respectfully submitted that the appellee's Motion to Affirm Judgment should be denied, and that this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1984

BURGER KING CORPORATION,
a Florida corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

JOINT APPENDIX

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Appeal Docketed June 19, 1984
Jurisdiction Postponed October 1, 1984

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IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

Case No.: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

v.

BRIAN MacSHARA, et al.,
Defendants.

(PART OF PLAINTIFF'S COMPOSITE EXHIBIT 21)

January 19, 1979

Messrs. John Rudzewicz and
Brian MacShara
345 Shotwell Court
Pontiac, MI 48054

Re: Burger King Location
Drayton Plains, Michigan

Gentlemen:

Pursuant to the requirements of Michigan's Franchise Investment Law, we are enclosing a copy of Burger King's Uniform Franchise Offering Circular together with two copies of a receipt, one of which is to be signed, dated, and returned to this office acknowledging that you received the disclosure information.

The signed receipt will become a part of the required documentation for your new Burger King location. We suggest that you carefully read the enclosed and, should you

have any questions regarding its contents, feel [illegible] to contact me at any time.

Very truly yours,

BURGER KING CORPORATION
Helen O. Donaldson, Director
Franchise Contracts Administration

HOD/pj
EIC

Enclosures

cc: H. G. Hoffmann, Jr.
A. Webb

FRANCHISE OFFERING CIRCULAR FOR PROSPECTIVE FRANCHISEES REQUIRED BY THE STATE OF MICHIGAN

Burger King Corporation
7360 N. Kendall Drive
P. O. Box 520783, General Mail Facility
Miami, Florida 33152
Phone: (305) 596-7011

The Burger King Corporation concept of franchise distribution is to offer good food at economical prices through quantity selling. A limited menu ensures uniform quality and speed of service suited for the lifestyle of today's consumer.

The initial franchise fee for the standard 20-year franchise is $40,000 which includes training and other services as herein described. The estimated initial investment, excluding real estate approximates $225,000. Estimated cost of land and building developed by the franchisee varies greatly but the majority run between $350,000 and $430,000. It should be noted that where the real property is developed by Company and leased to franchisee there shall be no rent abatement, diminution or reduction of rent for a period of one (1) year under any circumstances other than shall be taken in condemnation proceedings or by exercise of any right of eminent domain. THERE IS NO CONTRACTUAL PROVISION FOR FRANCHISE RENEWAL.

THIS OFFERING CIRCULAR IS PROVIDED FOR YOUR OWN PROTECTION AND CONTAINS A SUMMARY ONLY OF CERTAIN MATERIAL PROVISIONS OF THE FRANCHISE AGREEMENT. THIS OFFERING CIR-

CULAR AND ALL CONTRACTS OR AGREEMENTS SHOULD BE READ CAREFULLY IN THEIR ENTIRETY FOR AN UNDERSTANDING OF ALL RIGHTS AND OBLIGATIONS OF BOTH THE FRANCHISOR AND FRANCHISEE.

ALTHOUGH THESE FRANCHISES HAVE BEEN EXEMPTED FROM REGISTRATION UNDER THE MICHIGAN FRANCHISE INVESTMENT LAW, EXEMPTION DOES NOT CONSTITUTE APPROVAL, RECOMMENDATION OR ENDORSEMENT BY THE CORPORATION AND SECURITIES BUREAU OF THE STATE OF MICHIGAN OR A FINDING BY THE CORPORATION AND SECURITIES BUREAU OF THE STATE OF MICHIGAN THAT THE INFORMATION PROVIDED HEREIN IS TRUE, COMPLETE, ACCURATE OR NOT MISLEADING. A FALSE, INCOMPLETE, INACCURATE OR MISLEADING STATEMENT MAY CONSTITUTE A VIOLATION OF BOTH FEDERAL AND STATE LAW, AND SHOULD BE REPORTED TO BOTH THE FEDERAL TRADE COMMISSION, WASHINGTON, D. C. 20580 AND THE OFFICE OF THE CORPORATION AND SECURITIES BUREAU, P. O. BOX 30222, LANSING, MICHIGAN 48909.

THE MICHIGAN FRANCHISE INVESTMENT LAW MAKES IT UNLAWFUL TO OFFER OR SELL ANY FRANCHISE IN THIS STATE WHICH IS SUBJECT TO EXEMPTION FROM REGISTRATION WITHOUT FIRST PROVIDING TO THE PROSPECTIVE FRANCHISEE, AT LEAST 7 DAYS PRIOR TO THE EXECUTION BY THE PROSPECTIVE FRANCHISEE OF ANY BINDING FRANCHISE OR OTHER AGREEMENT, OR AT LEAST 7 DAYS PRIOR TO THE PAYMENT OF ANY CONSIDERATION BY THE FRANCHISEE, WHICHEVER OCCURS FIRST, A COPY OF THE OFFERING CIRCULAR TOGETHER

WITH A COPY OF ALL PROPOSED AGREEMENTS RELATING TO THE FRANCHISE.

Burger King Corporation's registered agent in the State of Michigan authorized to receive service of process is the Corporation Company, 64 Griswald Street, Detroit, Michigan.

The date of this Offering Circular is November 14, 1978

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FRANCHISE OFFERING CIRCULAR

1. *THE FRANCHISOR AND ANY PREDECESSORS:* Burger King Corporation is a Florida corporation located at 7360 N. Kendall Drive, Miami, Florida. It is the owner and operator of a chain of fast food restaurants and is a wholly-owned subsidiary of The Pillsbury Company, listed on the New York Stock Exchange with home offices in Minneapolis, Minnesota. Burger King Corporation has been in the business of franchising since 1954. It has since expanded to locations in 50 states, Puerto Rico, Germany, Bahamas, Canada, Australia, Spain, Sweden, England and

Denmark. As of May 31, 1978, there were 2,153 units in operation comprised of 436 company-owned units and 1,717 franchised units. Of the total number, 122 were located in the State of Michigan.

Burger King Corporation was originally founded in 1954 as Burger King of Miami, Inc., and incorporated as Florida Restaurants, Inc. in 1956. In 1963 the present name, Burger King Corporation, was adopted, and in June of 1967 it became a wholly-owned subsidiary of The Pillsbury Company. The Company does not now nor does it intend to do business under any name other than Burger King Corporation. Burger King Corporation is responsible for its franchise program and its several diversified divisions among which are Davmor Industries, which is engaged in the manufacturing of restaurant equipment, and Distron, its food processing and distribution division.

The management of Burger King Corporation believes the operation of its restaurants is a full-time business and franchises have never been issued for the operation of non-related businesses.

2. *IDENTITY AND BUSINESS EXPERIENCE OF PERSONS AFFILIATED WITH THE FRANCHISOR:* The business activities of Burger King Corporation are conducted by the officers and directors of the corporation all of whom may be contacted at P. O. Box 520783, General Mail Facility, Miami, Florida 33152. They are as follows:

Winston R. Wallin Chairman of Board of Directors	Stanley Kubu Vice President
Donald N. Smith President and Chief Executive Officer	William F. Murray Vice President

Donovan Christopherson Group Vice President	Richard D. Ungaro Vice President
E. Christian Schoenleb Group Vice President	Alden H. Bennett Vice President
Jerome B. Ruenheck Group Vice President	Carl T. Bergeman Vice President
Jerry G. Winter Vice President	Thomas F. Crummey Treasurer
Joseph M. Byrd Vice President	Jean Willis Secretary
Ramon J. Moral Vice President	William S. Spoor Director
Zane Leshner Vice President/General Counsel	Gordon M. Donhowe Director
C. James Lynch Vice President	Walter C. Scott Director
Ronald J. White Vice President	James W. McLamore Director
John A. Barnes Vice President	Philip D. Aines Director
Robert A. Carney Vice President	Norman Brinker Director
R. Victor H. Wood, Jr. Vice President	Donald N. Smith Director
Richard J. Roberts Vice President	Winston R. Wallin Director

Mr. Wallin was named Chairman of the Board of Burger King Corporation September 15, 1978. From June 1977 through September 1978, he presided as President and Chief Operating Officer of The Pillsbury Company, Minneapolis, Minnesota. In June of 1976, Mr. Wallin was named Executive Vice President having previously served as Vice President of Agri-Products division and Commodity Operations of The Pillsbury Company. Mr. Wallin has been affiliated with The Pillsbury Company since 1946.

Mr. Smith was named President and Chief Executive Officer of Burger King Corporation effective February 1, 1977. Prior thereto he held the position of Senior Executive Vice President and Chief Operations Officer of McDonald's Corporation, Chicago, Illinois, with whom he had been affiliated since 1966.

Mr. Christopherson was named Group Vice President, effective September, 1974. Prior thereto he was Vice President, Administration and Finance, and has been with Burger King Corporation since September, 1973. He was with The Pillsbury Company since July, 1958, last serving as Director, New Ventures/Products.

Mr. Schoenleb was named Group Vice President in January, 1976, having joined the company in April, 1972 as Vice President. Prior thereto he was Group Product Manager for the E. & J. Gallo Winery, Modesto, California.

Mr. Ruenheck was named Group Vice President in February, 1977. He joined the company in March, 1969 as a Management Trainee and has held the positions of District Manager and Division Manager until his promotion to Vice President in 1973.

Mr. Winter has been with Burger King Corporation since 1968 and was appointed Vice President in May, 1976. Prior

thereto he served as Franchise Representative, District Manager, Region Manager, and Division Manager, Restaurant Operations.

Mr. Byrd has been Vice President/Division Manager since November, 1974. He joined Burger King Corporation in October, 1967 and has held such positions as Supervisor, District Manager, and Region Manager.

Mr. Moral was named Vice President/Division Manager in June, 1977. He joined Burger King Corporation in 1962 and since that time has held the positions of Restaurant Manager, Area Supervisor, Franchise District Manager, Regicn Manager and Division Manager.

Mr. Leshner has been Vice President/General Counsel since January, 1976. He joined the company in April, 1972 as Corporate Counsel, and from November, 1974 until January, 1976 served as General Counsel. Prior thereto he was Staff Attorney for W. R. Grace and Company, Memphis, Tennessee, having been with them since 1968.

Mr. Lynch joined Burger King Corporation in October, 1977, as Vice President, International Division. Prior thereto he served as President of A & W International, Inc., Santa Monica, California. Prior to that he was associated with McDonald's Corporation, Chicago, Illinois, for several years.

Mr. White joined Burger King Corporation on November 1, 1977, as Vice President. Prior thereto and for the past twelve years he served as Vice President, Training, for McDonald's Corporation, Chicago, Illinois.

Mr. Barnes came to Burger King Corporation from The Pillsbury Company in 1972, serving as Technical Director, Food Products until 1974, at which time he joined the staff of McDonald's Corporation, Chicago, Illinois. In April of

1977, Mr. Barnes rejoined Burger King Corporation as Vice President, Menu Development.

Mr. Carney joined Burger King Corporation on April 24, 1978, as Vice President, Procurement. Prior thereto, and for the past fifteen years, he held various procurement staff positions with the Campbell Soup Company, Camden, New Jersey.

Mr. Wood joined Burger King Corporation in 1977 and holds the position of Vice President, Real Estate. Prior to that time he held the position of Director, International Real Estate, with McDonald's Corporation, Chicago, Illinois, with whom he had been affiliated since 1970.

Mr. Roberts joined Burger King Corporation in June, 1976 as Vice President/General Manager, Davmor, a division of Burger King Corporation. Prior thereto he had been Vice President and General Manager of Filter Dynamics, Edison, New Jersey; Director of Engineering for Cummins Engine Co., Cookeville, Tennessee; Engineering Manager for Tenneco Chemicals, Inc., Racine, Wisconsin; and Manager of Product Development for A. C. Spark Plug, Detroit, Michigan.

Mr. Kubu was appointed Vice President on July 1, 1974. He joined the company in May, 1968 as Director, Research and Development and has been Corporate Director, Quality Assurance since 1970.

Mr. Murray has been Vice President since February, 1973. He joined the company in August, 1969 as General Manager, Distribution and since November, 1971 had been Division Manager for Distron.

Mr. Ungaro was appointed Vice President in March, 1978, having joined the company in September 1972 as Project Engineer. Prior to 1972, Mr. Ungaro held positions with

the Kroger Company and Whitlock, Inc., both located in Detroit, Michigan.

Mr. Bennett has been with Burger King Corporation since 1968 and was recently appointed Vice President-Engineering. Prior thereto he served as assistant to the President of J. Russell Engineering, Boston, Massachusetts, through May, 1968.

Mr. Bergeman was appointed Vice President on October 1, 1977, after having served as Group Director, Information Systems, since January, 1976. Mr. Bergeman has been with Burger King Corporation since 1973.

Mr. Crummey was named Treasurer of Burger King Corporation in June, 1972, after having served as Assistant Treasurer from 1970 to 1972. From 1968 to 1970 he was a Financial Analyst with the company. Prior thereto he was with Wackenhut Corporation and Ernst & Ernst, Certified Public Accountants, both located in Miami, Florida.

Mrs. Willis was appointed Secretary in November, 1974. She joined Burger King Corporation in 1969 as secretary to the Assistant Secretary and Assistant General Counsel.

3. *LITIGATION*:

A. Burger King Corporation has no administrative or criminal proceeding or material civil actions pending, other than those listed herein, alleging a violation of any franchise law, fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations. There are currently pending the following civil actions involving Burger King Corporation as a party to the lawsuit alleging any of the above elements and

which, in the opinion of the Franchisor's several counsel, may be considered material:

Perington Wholesale, Inc. v. Burger King Corporation and Carpenter Paper Co.

Case No.: 74-1103

Court: U. S. District Court, District of Colorado

Date Filed: 11/26/74

This action arises from the termination by Burger King Corporation of plaintiff's status as an authorized distributor of certain products to Burger King franchisees. Plaintiff's complaint alleges that defendants violated Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act, Section 1 of the Robinson-Patmon [sic] Act, Article 4 of the Colorado State Antitrust law, and Colorado common law, and seeks compensatory damages, treble damages, punitive damages and injunctive relief. Co-defendant, Carpenter Paper Co. has been dismissed. Burger King Corporation has filed an answer denying liability. During pre-trial conferences, claims for violation of state antitrust laws were stricken and the Robinson-Patmon [sic] claims were abandoned. On August 23, 1977, Burger King's Motion and [sic] dismiss was granted. Plaintiffs have appealed and briefs have been filed.

National Restaurants, Inc. v. Burger King Corporation, Gerald Mason, Wesley Hardy and Donald Szabo

Case No.: 74-CV-675-WI

Court: U. S. District Court, Western Division

Date Filed: 11/22/74

Plaintiff, a Burger King franchisee, alleged defendants violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Plaintiff also sought a declaration that certain of defendant's trademarks were invalid and sought injunctive relief enjoining defendant from any claim or charge of infringement by plaintiff. Damages are alleged to be $10 Million and, trebled, $30 Million. The case was settled and Burger King Corporation acquired the restaurant operated by plaintiff. The cost of settlement over and above the value of the restaurant was minimal.

Systems Control, Inc. v. Burger King Corporation, et al

Case No.: Civil Action No. 75-1878

Court: Supreme Court of State of New Jersey, Middlesex County, Chaucer Division

Date Filed: 9/30/75

This action was instituted to attempt to prevent termination of the plaintiff's ten Burger King restaurant franchises as a result of their violation of the provisions of their franchise agreements

relating to trade secrets and engaging in a business which is similar to a Burger King restaurant. Plaintiffs sought to have the restrictive covenant contained in the franchise agreements declared unlawful, and alleged that the company attempted to monopolize the self-service fast food business in New Jersey and sought to recover damages for alleged restraints of trade. The company denied the claims and filed a counterclaim seeking a judgment declaring that the franchise agreements had been breached, that the restrictive covenants were valid and enforceable, terminating the franchise agreements and enforcing the various lease agreements between the company and plaintiffs, enjoining plaintiffs from infringing upon the company trademarks and service marks, enjoining them from utilization of trade secrets and other confidential information disclosed by the company as a result of the franchise relationship. The case was settled when the ownership of plaintiff's corporation was sold. In the settlement, plaintiff agreed not to utilize Burger King Corporation's trade secrets and trade dress in any future business endeavor.

Harold Canada and Gladys Canada v. Burger King Corporation

Case No. IP 77-269-C

Court: U. S. District Court, Southern District of Indiana

Date Filed: 3/25/77

Plaintiffs alleged a breach by Burger King Corporation of an implied agreement to grant plain-

tiffs a franchise, contending they made various financial arrangements and commitments in reliance on the alleged grant. A Stipulation of Dismissal with prejudice was entered subsequent to settlement between the parties.

(Illegible)

Case No.: N78-143

Court: U.S. District Court, District of Connecticut

Date Filed: 5/30/78

Plaintiffs seek damages for alleged fraud and deceit, breach of contract and tortious interference with contract by defendants in the granting and operating of Burger King franchises in Fairfield and New Haven Counties. Answer and affirmative defenses have been filed on behalf of Burger King Corporation.

V.E.M. Corp., S.G.T. Corp., et al v. Burger King Corporation

Case No.: CV 178-32

Court: U.S. District Court, Southern District of Georgia

Date Filed: 2/17/78

Complaint alleges antitrust violations by monopolization and attempts to monopolize the hamburger fast food restaurant business in the southeastern U.S. by requiring plaintiff to purchase food and supplies from Burger King Corporation or designated sources; and alleged abandonment of trade-

mark. Answer and counterclaim have been filed and the action is in the discovery stage.

Melvin Holmes v. Burger King Corporation

Case No.: 78-1047

Court: Circuit Court of 11th Judicial Circuit of Florida

Date Filed: 1/25/78

Complaint seeks to recover compensatory and punitive damages because of alleged fraud in the sale of a franchised restaurant. Answer and counterclaim have been filed and discovery is continuing.

B. None of the Company's principal officers, directors or franchise brokers, during the ten-year period preceding the date of this offering circular, have been convicted of a felony or pleaded nolo contendere to a felony charge or been held liable in a civil action by final judgment or been the subject of a material complaint or other legal proceeding if such felony or civil action involved violation of any franchise law, fraud, embezzlement, fraudulent conversion, restraint of trade, unfair or deceptive practices, misappropriation of property or comparable allegations, to the best of our knowledge.

C. None of the Company's principal officers, directors or franchise brokers are subject to any currently effective injunctive or restrictive order or decree relating to the Franchise or under any federal, state or Canadian franchise, securities,

(illegible)

pending action or proceeding brought by a public agency, to the best of our knowledge.

4. *BANKRUPTCY:* To the best of our knowledge, none of Burger King Corporation's principal officers have, during the fifteen-year period immediately preceding the date of this offering circular, ever been adjudged bankrupt or required to reorganize due to insolvency; nor were any of them a principal officer of any company which was adjudged bankrupt or reorganized due to insolvency during or within one year after the period that such officer held such position.

5. *FRANCHISEE'S INITIAL FEE OR OTHER INITIAL PAYMENTS:*

The initial franchise fee for a standard twenty-year franchise is $40,000 and must be paid prior to the opening of the restaurant. Franchise fees are utilized to sustain and expand upon the services offered in the process of a franchise sale, including but not limited to the cost of franchise sales activities, training programs, restaurant opening support, legal expenses, accounting programs, and architecture and design expense. The franchise fee is fully earned upon execution of the agreement and is not refundable.

6. *OTHER FEES:* SUMMARY OF ESTIMATED COSTS

Franchise Fee	$ 40,000 (1)
Site Development Fee	5,000 (2)
Landscaping (Estimated)	18,500 (3)
Standard Sign Package (Estimated)	14,000 (4)
Standard Restaurant Equipment (Estimated), Including Installation	100,000
Freight/Sales Tax on Equipment (Estimated)	8,000 (5)
Working Capital for Prepaid Insurance*, Rent, Inventory, Permits, Utility Deposits, Supplies, Employee Training, Uniforms, etc.	21,500
Cash and Inventory Control Devices	18,000
TOTAL ESTIMATED COST	$225,000

(1) Plus a continuing monthly royalty of 3.5% of gross sales and a continuing monthly, advertising contribution of 4% of gross sales payable on the 10th of each calendar month. In addition, if the restaurant location is leased from Burger King Corporation, Franchisee shall pay a minimum rental of 13.4% of approximated capitalized site acquisition and construction costs, or 8.5% of monthly gross sales, whichever is greater.

(2) Real Estate and construction assistance.

(3) Landscaping for company-owned operations averages approximately $18,500.

(4) Includes foundation and steel, plus applicable sales or use tax. This figure reflects the average sign package cost for a drive-thru restaurant.

(5) F. O. B. Miami and 4% sales tax.

(6) *Insurance to include a Comprehensive General Liability Policy, including Products Liability, in the amount of $1,000,000 per occurrence for bodily injury and $500,000 property damage liability, or in such other amounts as Company may reasonably request, for the operation of the premises.

The Burger King Lease is a net lease and Franchisee is responsible for, among other things, tax assessments, repairs and alterations. Real Estate taxes will vary according to type of building and location.

7. *FRANCHISEE'S INITIAL INVESTMENT*: The summary of estimated costs in paragraph 6 above, reflects the estimated initial expenses a franchisee would incur in commencing operations, excluding personal expenses. A projected high-low dollar cost as to real estate is difficult to estimate due to the many variables which must be taken into consideration, e.g., geographic location, square footage, unusual building conditions, modifications and change orders, choice of interior decor, lot dimension, and other relevant factors peculiar to each acquisition. A rough estimate for land and building costs is $400,000.

The franchisee is not required to purchase any goods, supplies, equipment or fixtures from Company or any specified source, however, all equipment, fixtures, construction, leasehold improvements and interior decor must meet established standards and specifications. Should Franchisee elect to purchase restaurant equipment from Davmor, a division of Burger King Corporation, the current costs approxi-

mate $100,000 plus sales tax and freight. Local ordinances of a particular community may result in variances in types of required equipment which may affect the total price. Cash registration equipment approximates an additional $18,000. An average drive-thru sign package may be purchased at a cost of approximately $14,000, including foundation and steel. Burger King Corporation does not generally finance equipment, furnishings, or other fixed assets. Inventory, consisting of food, paper products, and working capital, including such items as prepaid insurance premiums, rent, permits, utility deposits, and supplies, would approximate $21,500.

THERE ARE NO OTHER DIRECT OR INDIRECT PAYMENTS IN CONJUNCTION WITH THE PURCHASE OF THE FRANCHISE.

8. *OBLIGATIONS OF FRANCHISEE TO PURCHASE OR LEASE FROM DESIGNATED SOURCES*: Burger King Corporation makes no requirement of its franchisees to purchase or lease services, supplies, products, fixtures, or other goods from it or any designated sources, however, all goods, services, supplies, fixtures, equipment and inventory relating to the establishment and/or operation of the franchised business must satisfy Company's specifications and criteria as to quality standards.

9. *OBLIGATIONS OF FRANCHISEE TO PURCHASE OR LEASE IN ACCORDANCE WITH SPECIFICATIONS OR FROM APPROVED SUPPLIERS*: Although Burger King Corporation does not obligate Franchisee to purchase or lease goods or services from Franchisor or designated sources, in order to uphold the high standards of its quality assurance program and to ensure compliance with product specifications and food safety, it does reserve the right to approve sources of the products utilized in its restaurant

operations. Any changes to or modifications of its standards are immediately communicated to franchisees.

Burger King Corporation, through its quality assurance program, conducts audits of approved suppliers encompassing product specification compliance, plant standards, and distribution facilities. If violations are not corrected or are repetitive in nature, approval is revoked. Alternate sources may be authorized provided that the product satisfies all Burger King Corporation specifications and criteria as to quality, appearance, size, taste, and processing.

Franchisor is one but not the only approved supplier of goods and services pertinent to the operation of a Burger King Restaurant, and franchisee is free to purchase from any approved supplier. Burger King Corporation is not privy to any contracts between franchisee and supplier nor does it receive any remuneration from approved sources.

10. *FINANCING ARRANGEMENTS*: Burger King Corporation does not generally offer direct financing to a standard franchisee, but upon request will assist qualifying individuals in obtaining the necessary financing if Franchisee is unable to arrange same through his own available sources. No payments are received for this assistance. There are circumstances, however, such as the sale of existing, multiple company units, where direct financing is available. There is, subject to availability of funds, limited financing to minorities through Burger King MESBIC, Inc., a wholly-owned subsidiary of Burger King Corporation, and licensed by the Small Business Administration. Burger King Corporation does not now, nor has it ever made a practice of selling, assigning or discounting to a third party any note, contract or other obligation of a franchisee, in whole or in part.

Prior to the opening of Franchisee's restaurant, Burger King Corporation will, upon request and agreement to pay a site development fee, assist Franchisee in site selection and will furnish him with multiple sets of standard building plans and specifications together with advice and consultation relative to their application. Intensive training programs are conducted at Franchisor's training centers throughout the country and Franchisee is required to attend and satisfactorily complete all courses. Franchisee receives guidance in the hiring and training of in-store personnel and overall opening supervision during his first days of operation. Advertising promotions are planned to introduce the new franchisee and his new Burger King Restaurant to the community. These services are capsulized in Article 5, page 3 of the current Franchise Agreement.

During the term of his restaurant operation, Franchisee will receive the benefits derived from Franchisor's research and development programs, as well as advertising and marketing research data. New techniques in food preparation and restaurant services are made available to franchisees as they are tested and approved.

Prior to and during the operation of his restaurant business, Burger King Corporation field personnel are available to assist the franchisee with any individual problems he may encounter. Franchisees desiring to remodel and update the image of their restaurant are offered total cooperation and encouragement within set guidelines. Information, layouts, and plans are either furnished or, depending upon complexity, made available to Franchisee at nominal cost.

Burger King Corporation assists in the selection of restaurant locations for franchisees acquiring their own property

and must approve all sites. The criteria applied when assisting franchisees in site selection is the same criteria utilized in the site selection of Company store operations. Demographic studies are made to determine traffic count and patterns and density of a particular market area; relevance of the site to potential competition as well as relevance of the site to existing Burger King operations are strongly considered; aerial photographs are utilized to survey the surrounding commercial activity. Additional studies and research may be done for exceptional locations where greater in-depth information must be taken into consideration before a final conclusion is reached as to site desirability.

Typically, a Franchisee receives his Franchise Agreement for execution approximately four weeks prior to opening. The documents are required to be signed and returned, together with the franchise fee at least one week before the restaurant is scheduled to open.

Burger King Corporation presently operates nine training centers throughout the country and each new franchisee is required to undertake and satisfactorily complete a course of training of approximately five weeks duration. Fifty hours of in-store training must be completed by Franchisee and/or his operating partner within six weeks of franchise approval.

(Illegible)
center nearest his home and normally scheduled during the time the restaurant is under construction. Here he receives instruction relative to equipment, cost and cash control, total food preparation, customer service, employee scheduling and methods of reducing operating costs. Both films and closed circuit television are utilized as training techniques. In-store training covers the management role

as well as training in each position to be filled by an hourly employee. Our training supervisors are recruited from top restaurant managers of Company operations and average three to four years previous experience with the Company. Tuition is included in the franchise fee, however, each franchisee is responsible for expenses incurred in traveling to and from the center and bears the cost of his own living expenses while attending the training program.

All new franchisees and/or operating partners are required to participate in the Company's training program. Additional training or refresher courses are available to existing franchisees at any time, although they are not required under the franchise agreement to avail themselves of these services.

12. *EXCLUSIVE AREA OR TERRITORY*: Generally, franchisees receive no exclusive area or territory. Burger King Corporation has extended area development agreements in order to expand heretofore undeveloped but potential market areas. Such agreements are granted for a specific term and usually contain a strict schedule expediting development of the area. Exclusivity normally precludes the establishment by Franchisor of company-owned or other franchisee outlets in the area.

13. *TRADEMARKS, SERVICE MARKS, TRADE NAMES, LOGOTYPES, AND COMMERCIAL SYMBOLS*: Burger King Corporation is the owner of certain service marks and trademarks which have been registered on the Principal Register of the United States Patent and Trademark Office. Company licenses to franchisee for the term of the franchise the right to use at the premises the name BURGER KING, together with such other insignia, symbols and trademarks which may be approved and authorized from time to time.

NAME	TYPE MARK	U.S. NO.	DATE
BURGER KING	Trademark	869,775	5/20/69
	Service Mark	722,375	10/3/61

These marks are not currently registered in the State of Michigan. There are presently no effective determinations of the Patent Office, the trademark administrator of the State of Michigan or any court, any pending interference, opposition or cancellation proceeding nor any pending material litigation involving trademarks, service marks, trade names, logo types or other commercial symbols which are relevant to their use in the State of Michigan.

Further, there are no agreements in effect in the State of Michigan which significantly limit the rights of the Franchisor to use or license the use of such trademarks, service marks, trade names, logotypes or the commercial symbols in any manner material to the franchise.

In the event of any threat or challenge to the validity of any proprietary rights, trademarks, trade names or service marks, franchisee is obligated to notify Burger King Corporation who has the sole discretion to take such action as it deems advisable.

There are no infringing uses actually known to Franchisor which could materially affect franchisee's use of such trademarks in the State of Michigan.

14. *PATENTS AND COPYRIGHTS*: Franchisor owns no patents which are licensed to the franchisee. Burger King Corporation does have proprietary rights in certain manuals and other materials which are made available to the franchisee. These manuals and other materials contain trade secrets and are loaned to franchisee for the exclusive purpose of using them in connection with the

Burger King Franchise. The Franchise Agreement grants him the right to use the material for the term of the franchise. Franchisee contractually agrees not to divulge any trade secrets or reproduce or exhibit any portion of the manuals or other materials to any person other than its employees.

In the event of any challenge to the validity of any trademarks, trade names, patents or copyrights, franchisee is obligated to notify franchisor who has the sole discretion to take such action as it deems advisable.

15. *OBLIGATION OF THE FRANCHISEE TO PARTICIPATE IN THE ACTUAL OPERATION OF THE FRANCHISE BUSINESS*: Burger King Corporation's concept of franchising is based upon a strong personal identification between the individual applicant and the management and ownership of the franchised unit. Burger King Corporation does not believe in absentee ownership of franchised restaurants and for this reason applicants for franchises must meet rigid established qualifications and at least one of the named franchisees must personally participate in the direct operation of the franchised business and retain a minimum of 50% owner's equity in the business.

16. *RESTRICTIONS ON GOODS AND SERVICES OFFERED BY FRANCHISEE*: Uniformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor. Franchisee, therefore, agrees to serve only those menu items specified by Burger King Corporation which meet its specifications and agrees to comply with the high standards of service and cleanliness as provided and set forth for each franchisee in the Burger King Manual of Op-

erating Data. The Franchise Agreement provides that the Restaurant will be open for business to the public a minimum 11:00 A.M. to 11:00 P.M., seven days a week unless otherwise authorized, however these hours are flexible and may, with Company consent, be modified so as to be of greatest benefit to Franchisee. All restaurants are required to be open a minimum of twelve hours daily.

17. *RENEWAL, TERMINATION, REPURCHASE, MODIFICATION AND ASSIGNMENT OF THE FRANCHISE AGREEMENT AND RELATED INFORMATION:* The current franchise is for a term of 20 years, and contains no provision for renewal. Franchisees who have complied with the provisions of the franchise and who have throughout the franchise term met the operational standards of Burger King Corporation will be given favorable consideration for a new franchise at the expiration of the agreement subject to and consistent with the Company's franchising practices at that time. Specific acts by the Franchisee which would be considered a default are delineated in Article 16, pages 9 and 10 of the Franchise Agreement. Such acts of default which are not timely cured or remedied could result in termination of the franchise. Repeated violations of a material nature could constitute good cause for termination or nonrenewal. No right of termination is granted to the franchisee once the Franchise Agreement has been executed.

If Franchisee is leasing the premises from Burger King Corporation, upon termination Franchisee retains liability for payment of base rent through the expiration of his lease term. Upon termination or expiration of a franchise agreement, Franchisee retains no right to the service marks or trademarks nor does he retain any right to their continued use in any similar business enterprise or identify itself in any manner as a current or former Franchisee

of Burger King Corporation. Upon termination or expiration, Franchisee shall be required to make such physical changes to the site as to effectively distinguish it from other Burger King Restaurants. Burger King Corporation may purchase Franchisee's paper goods, containers, printed menus and any and all materials bearing Burger King Corporation's trade names or trademarks. If the premises are leased from Company then, in the event of default, Company may offer to purchase his restaurant equipment, furniture, and signs at fair market value. Upon expiration of the franchise agreement, Franchisee retains no equity interest in the Burger King system. The franchise agreement constitutes the entire agreement of the parties and any modifications thereto may only be effected by mutual agreement in written form.

Burger King Corporation holds no right to unilaterally repurchase a franchise from an existing franchisee. In the event Franchisee desires to sell his restaurant, Burger King Corporation does have right of first refusal upon the same terms and conditions as tendered by the prospective purchaser. Further, Burger King Corporation at all times retains the right of approval of any prospective purchaser, including an existing franchisee, prior to the consummation of a sale. In the event of the death of a franchisee, Burger King Corporation shall consent to the transfer of interest to Franchisee's spouse, heirs or relatives, if, at the sole discretion and judgment of Company, such persons obtaining said interest shall be capable of conducting the business in a manner satisfactory to Company. The assignment, transfer or encumbrance of the Franchise Agreement without consent of Company shall constitute a material breach of the Agreement.

Burger King Corporation's present Franchise Agreement contains no provisions for the sale or assignment of Fran-

chisor's interest in the Company. Burger King Corporation's present franchise agreement contains a provision wherein Franchisee agrees that during the term of the agreement he shall not engage in any restaurant or prepared food business which is the same or similar to Company's business; nor will he engage in such business within a two-mile area for a period of twelve months after termination without the written consent of Company. Covenants not to compete upon termination or expiration of the franchise are generally unenforceable in the State of Michigan.

18. *ARRANGEMENTS WITH PUBLIC FIGURES*: The Company has no contractual commitment with public figures for the use of their names, and in those instances where athletic stars or show business personalities appear in spot advertisements or promotions for Burger King restaurants, the details of their appearances and their compensation will have been negotiated by the Company's advertising agency or the Company itself. Such promotions are usually in connection with grand openings or national advertising, and to the extent that it involves a franchised store, the franchisee may be responsible for the cost and contract details. Public figures contracted for promotional appearances are not involved in the Restaurant management nor have they any investment interest in the franchised operation itself.

19. *ACTUAL, AVERAGE, PROJECTED OR FORECASTED FRANCHISE SALES, PROFITS, OR EARNINGS*: Franchisor does not disclose to prospective franchisees the actual, average or projected sales, profits, or earnings of existing franchised units. A prospective franchisee will be furnished with a financial information package which includes representative cost factors based on a sampling of 100 company operated restaurants, and pro-

vides a basis upon which the applicant may compute his own pro forma cash flow chart. Franchisee is urged to consult with his personal accountant, attorney and, where possible, existing Burger King franchisees. A copy of the financial information package is attached hereto.

20. *INFORMATION REGARDING FRANCHISES OF THE FRANCHISOR*: One thousand seven hundred seventeen franchised Burger King restaurants were in operation as of May 31, 1978, its most recent fiscal year end, of which 60 were in the State of Michigan. One thousand seven hundred forty-four franchised restaurants were in operation as of the date of the preparation of this offering circular, 63 of which were in the State of Michigan. The Franchise Agreement must be executed no later than seven days prior to store opening. There are approximately 31 Burger King franchised restaurants scheduled to open in the near future for which agreements have been executed; 1 is in the State of Michigan.

Attached is a list of the names, addresses and telephone numbers of all franchise businesses located in the State of Michigan and operating under franchise agreements with Franchisor.

It is estimated that during Burger King's current fiscal year, which commenced June 1, 1978, 270 additional franchise units are projected, 11 of which are planned for the State of Michigan.

Burger King Corporation's history of franchise and company store sales, acquisitions and terminations during the preceding three year period is as follows:

(1) None have been cancelled for failure to comply with quality control standards. Thirty-four were terminated for other reasons.

(2) There have been no franchises which have reached maturity that Franchisor has refused to renew.

(3) Seventeen franchised units were reacquired through purchase by Franchisor and seventy-nine Company units were sold to franchisees.

21. *FINANCIAL STATEMENTS*: Attached hereto is a copy of Burger King Corporation's fiscal '78 financial statement and a copy of The Pillsbury Company Annual Report.

22. *CONTRACTS*: Attached hereto are representative copies of a current Franchise Agreement, Sublease Agreement, and Preliminary Agreements.

An acknowledgement receipt is attached hereto and made a part hereof. It is to be detached by Franchisee, signed, dated, and returned to Burger King Corporation.

• • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(PLAINTIFF'S EXHIBIT 3)

PRELIMINARY AGREEMENT

THIS AGREEMENT is made and entered into at Miami, Dade County, Florida, as of the 14th day of February, 1979, by and between BURGER KING CORPORATION, a Florida corporation ("BKC"), and John Rudzewicz and Brian MacShara ("FRANCHISEE").

INTRODUCTION

A. BKC has developed a restaurant format and operating system (the Burger King System) and is engaged in the business of operating and granting franchises to operate Burger King Restaurants using the Burger King System and the marks BURGER KING and WHOPPER and such other marks as may be authorized for use from time to time in the operation of Burger King Restaurants.

B. FRANCHISEE, desiring a franchise to operate a Burger King Restaurant, has made application to BKC.

C. FRANCHISEE was notified by a letter dated January 15, 1979, a copy of which is attached hereto as Exhibit "A", that his application for a franchise has been conditionally approved.

In consideration of the mutual covenants in this Agreement, the parties agree as follows:

1. FRANCHISEE agrees to cooperate with and, upon request, assist BKC in obtaining a suitable location within the designated area for the establishment of FRANCHISEE's Franchised Restaurant.

2. FRANCHISEE acknowledges his understanding that the franchise approval shall terminate if:

(a) Within twelve (12) months from January 12, 1979, a mutually acceptable site has not been acquired and construction commenced in accordance with plans approved by BKC, or

(b) BKC notifies FRANCHISEE that it has decided not to develop a site in designated area. If this should occur, FRANCHISEE may re-apply for a franchise in another available area, or

(c) FRANCHISEE fails to continue to meet BKC's financial requirements for a franchise, or

(d) FRANCHISEE fails to comply with the provisions of this Agreement, or

(e) BKC discovers that FRANCHISEE has made an untrue or misleading statement in his franchise application.

This Agreement shall be of no further force or effect upon termination of franchise approval or the date the Franchised Restaurant opens for business. BKC shall have no liability to FRANCHISEE if it for any reason fails to develop a site for the operation by FRANCHISEE of a Burger King Restaurant.

3. FRANCHISEE agrees to sign and return to BKC, within fifteen (15) days after receipt, a Franchise Agreement and Lease/Sublease, if applicable, in the then current form together with the franchise and site development fees. FRANCHISEE agrees that the Franchised Restaurant shall not be opened prior to the execution of a Franchise Agreement and Lease/Sublease and payment of the franchise and site development fees, and any other obligations owed by FRANCHISEE to BKC.

FRANCHISEE acknowledges that he has had an opportunity to review the Franchise Agreement currently being issued to new franchisees and will not do any act or cause to be done anything inconsistent with the provisions of said Franchise Agreement.

4. As a condition precedent to the Franchised Restaurant opening, FRANCHISEE and a designated manager must successfully complete BKC's training program at locations specified by BKC. The training shall include approximately three hundred (300) hours in-store structured training and approximately three (3) weeks instructional training at a Whopper College Regional Training Center and such other training facility as may be established by BKC. There shall be no charge for participation in the training program; however, FRANCHISEE shall be responsible for all travel and living expenses, compensation of and worker's compensation for himself and any manager while enrolled in the training program and any other personal expenses associated with such training.

5. The building for the Franchised Restaurant shall be constructed in a manner authorized and approved by BKC. All signs, equipment and furnishings used in the Franchised Restaurant shall meet BKC's specifications, criteria and performance standards.

6. Franchise approval was granted based upon the qualifications of FRANCHISEE and, therefore, this Agreement or any right or interest herein cannot be sold, assigned or transferred by FRANCHISEE.

7. FRANCHISEE agrees to pay to BKC a site development fee in the amount of Five Thousand Dollars ($5,000) for real estate services to be performed by BKC in selecting and negotiating for the acquisition of the site for FRANCHISEE's Franchised Restaurant, for assistance

in arranging for the construction of the restaurant building, and for monitoring through periodic inspections the construction of the restaurant building. BKC, by providing these services, does not guarantee or warrant the success of the Franchised Restaurant or the quality of construction. FRANCHISEE agrees to look to the contractor, and not BKC, for repairs or replacements which may be needed or for damages sustained because of any defects in workmanship or materials.

THIS AGREEMENT is executed by the parties effective as of the day and year indicated on the first page.

BURGER KING CORPORATION
By: /s/ (Illegible)
Executive Vice President
Attest: /s/ Helen O. Donaldson
Assistant Secretary

/s/ John J. Rudzewicz
John Rudzewicz

/s/ Brian MacShara
Brian MacShara

.....
FRANCHISEE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(PLAINTIFF'S EXHIBIT 8)

FRANCHISE AGREEMENT

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BURGER KING RESTAURANT FRANCHISE AGREEMENT

THIS AGREEMENT is made and entered into at Miami, Dade County, Florida, as of the 4 day of June, 1979, by and between BURGER KING CORPORATION, a Florida corporation ("BKC") and JOHN RUDZEWICZ and BRIAN MacSHARA ("FRANCHISEE").

INTRODUCTION

A. BKC is the owner of certain trademarks and service marks including BURGER KING which has been registered with the United States Patent and Trademark Office.

B. BKC has developed a restaurant format and operating system, including a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered, and procedures for inventory and management control (the Burger King System) and is engaged in the business of operating and granting franchises to operate Burger King Restaurants using the Burger King System and the marks BURGER KING and WHOPPER and such other marks as may be authorized from time to time for use in connection with Burger King Restaurants (the Burger King Marks).

C. BKC has established a high reputation and a positive image with the public as to the quality of products and services available at Burger King Restaurants, which reputation and image have been and continue to be unique benefits to BKC and its Franchisees.

D. FRANCHISEE recognizes the benefits to be derived from being identified with and licensed by BKC, and being able to utilize the Burger King System and the

Burger King Marks which BKC makes available to its franchisees.

E. FRANCHISEE desires to be franchised to operate a Burger King Restaurant at a specified location, and FRANCHISEE acknowledges that he has had a full and adequate opportunity to be thoroughly advised of the terms and conditions of this Agreement by counsel of his own choosing at least seven (7) days prior to its execution, and is entering into this Agreement after having made an independent investigation of BKC's operations and not upon any representation as to the profits and/or sales volume which FRANCHISEE might be expected to realize, nor upon any representations or promises by BKC which are not contained in this Agreement.

F. While FRANCHISEE has no contractual right, or BKC any obligation, to renew this franchise or enter into a successor franchise, BKC's business practice is structured to encourage succession and anticipates that a very high percentage of franchisees will seek and qualify for a successor franchise. Commitment to high standards, adaptation to a constantly changing competitive environment, sound financing, progressive merchandising, innovation, contribution of ideas and active participation in the system and community are the characteristics of a desired franchise operator. The franchisee not able to satisfy BKC successor standards will so be advised approximately four (4) years prior to the expiration of the term (or upon the occurrence of a disqualifying act during the last four (4) years). This advance notice period will afford the franchisee ample time and opportunity to recoup the full value of the franchised business through sale to a qualified successor. In addition to the balance of the original term, a full twenty (20) year franchise (assuming land availability) will be offered by BKC in

support of the sale, subject to the then standard qualifying conditions requested of all franchisees (or new applicants when appropriate) qualifying for succession. The value of the Burger King System is enhanced by constant commitment to upgrading the quality of the individual franchisee and franchised restaurant business.

G. This Agreement, together with the Franchise Application and Management Commitment Form submitted by FRANCHISEE to BKC upon which BKC is relying in granting this franchise, constitute the entire agreement of the parties and supersedes all prior negotiations, commitments, representations and undertakings of the parties with respect to the subject matter of this Agreement.

In consideration of the mutual covenants contained in this Agreement, the parties agree as follows:

1. FRANCHISE GRANT: TERM

BKC grants to FRANCHISEE a license for a period of twenty (20) years to use the Burger King System and the Burger King Marks in the operation of a Burger King Restaurant (Franchised Restaurant) at 4983 Dixie Highway, Drayton Plains, Michigan. The term of this Agreement shall commence on the date the Franchised Restaurant opens for business and shall expire twenty (20) years thereafter unless sooner terminated in accordance with the provisions of this Agreement. FRANCHISEE accepts this license with the full and complete understanding that the license is for twenty (20) years with no promise or assurance of renewal or the granting of a new license at expiration. This license is for the described location only and does not in any way grant or imply any area, market or territorial rights proprietary to FRANCHISEE.

2. FRANCHISE FEE

FRANCHISEE acknowledges that the grant of this franchise constitutes the consideration for the payment by FRANCHISEE to BKC of Forty Thousand Dollars ($40,000), and that this sum shall be fully earned by BKC upon the execution and delivery of this Agreement.

3. FRANCHISEE REPRESENTATIONS

FRANCHISEE acknowledges his/their understanding of BKC's franchising policy of requiring all individuals who have any interest in the Franchised Restaurant, whether directly, beneficially or contingently, to be named in and be a party to the Franchise Agreement. If FRANCHISEE consists of more than one individual, the group must include an operating partner who, throughout the term of the Agreement, lives in the locality of the Franchised Restaurant. The operating partner must have a minimum 50% equity ownership (including profits) and a minimum 50% controlling interest through any voting apparatus in the Franchised Restaurant and must devote his full time and best efforts to the day-to-day operation of the Franchised Restaurant with no operational or management commitments in other businesses (except other Burger King Restaurants operated under franchises granted by BKC). FRANCHISEE agrees to furnish BKC with such evidence as BKC may request from time to time for the purpose of assuring BKC that FRANCHISEE's interest remains as represented in this Agreement.

4. STANDARDS AND UNIFORMITY OF OPERATION

The Burger King System is a comprehensive restaurant format and operating system for the sale of uniform and quality food products, emphasizing prompt and courteous service in a pleasant atmosphere. The establishment and

maintenance of a close personal relationship between BKC and FRANCHISEE in the operation of the Franchised Restaurant and adherence to the principles of the Burger King System constitute the basic underlying substance of this license.

Suggestions from franchisees for improving products, equipment, uniforms, restaurant facilities, service format and advertising are encouraged and will be considered by BKC when adopting or modifying standards, specifications and procedures for the Burger King System.

FRANCHISEE acknowledges and agrees that adherence to BKC's restaurant design and color schemes, signage, interior decor and equipment systems requirements, menu and service format and the provisions of the Manual of Operating Data (MOD Manual) are reasonable, necessary and essential to the image and success of each Burger King Restaurant and the Burger King Restaurant System. The MOD Manual contains the official mandatory restaurant operating standards, specifications and procedures prescribed from time to time by BKC for the operation of a Burger King Restaurant. The MOD Manual shall be kept at the Franchised Restaurant at all times and all changes or additions shall be inserted upon receipt. FRANCHISEE agrees that changes in the standards, specifications and procedures may become necessary and desirable from time to time and agrees to accept and comply with such modifications, revisions and additions to the MOD Manual which BKC in the good faith exercise of its judgment believes to be desirable and reasonably necessary. The confidential and proprietary material and information of BKC set forth in the MOD Manual is to be used by FRANCHISEE only in connection with the operation of the Franchised Restaurant and other licensed Burger King Restaurants. The MOD Manual and other

specifications, standards and operating procedures communicated in writing to FRANCHISEE shall be deemed a part of this Agreement. FRANCHISEE agrees:

A. Building and Premises

The building will be constructed and the premises improved in the manner authorized and approved by BKC and the appearance of the building and the premises will not thereafter be altered except as may be approved in writing by BKC. Further, FRANCHISEE shall maintain the building and premises in good condition and make all improvements and alterations as may be determined by BKC to be reasonably necessary to reflect an acceptable Burger King Restaurant image. FRANCHISEE shall undertake and complete such repairs, improvements and alterations as may be requested by BKC within the reasonable time specified by BKC.

B. Signs

The Burger King Marks will be displayed only in the manner and at such locations as are authorized by BKC. FRANCHISEE agrees to maintain and display signs reflecting the current image of Burger King Restaurants and shall not place additional signs or posters on the premises without the prior written consent of BKC. FRANCHISEE shall discontinue the use of and destroy such signs as are declared obsolete by BKC.

C. Equipment

Only equipment that shall have been approved by BKC as meeting its criteria and performance standards shall be used in the Franchised Restaurant. The equipment shall be maintained in a condition that meets operational standards specified in the MOD Manual, and as equipment

becomes obsolete or inoperable, FRANCHISEE will replace such items with the types and kinds of equipment as are then being installed in new Burger King Restaurants at the time of replacement. If BKC determines that additional or substitute equipment is needed because of a change in menu items or methods of preparation and service, FRANCHISEE will install the new equipment within the reasonable time specified by BKC.

D. Vending Machines, Etc.

Telephone booths, newspaper racks, juke boxes, cigarette, gum and candy machines, games, rides or any other vending machines will not be installed on the premises without the prior written approval of BKC.

E. Menu and Service

All menu items which BKC may deem appropriate to take fullest advantage of the potential market and achieve standardization in the Burger King System will be served, and no items which are not set forth in the MOD Manual or otherwise authorized and approved by BKC in writing will be served. FRANCHISEE shall adhere to all specifications contained in the MOD Manual or as otherwise prescribed by BKC as to ingredients, methods of preparation and service, weight and dimensions of products served, and standards of cleanliness, health and sanitation. All food, drink and other items will be served and sold in packaging that meets BKC's specifications. Only food and supplies from approved sources shall be used in the Franchised Restaurant.

F. Hours of Operation

The entire Franchised Restaurant shall be open for business as a minimum 11:00 A.M. to 11:00 P.M., seven

(7) days a week, fifty-two (52) weeks a year unless otherwise authorized or directed by BKC. The Franchised Restaurant may be closed on Thanksgiving and/or Christmas if a majority of the Burger King Restaurant operators in the market area (A.D.I.) in which the Franchised Restaurant is located elect to close on the holiday.

G. Uniforms

All employees shall wear uniforms of such design and color as from time to time shall be prescribed by BKC.

H. Advertising and Promotional Materials

Only those advertising or promotional materials or items which are authorized by BKC in writing prior to use shall be used, sold or distributed, and no display or use of the Burger King Marks shall be made without the prior written permission of BKC. All materials on which the Burger King Marks are used must include the designation [R] or such other notice of registration or license legend as BKC may specify.

I. Right of Entry and Inspection

To ensure compliance with this Agreement, BKC shall have the unrestricted right to enter the Franchised Restaurant to conduct such activities as it deems necessary to ascertain compliance with this Agreement. The inspections may be conducted without prior notice at any time when FRANCHISEE or one of his employees is at the Franchised Retaurant. The inpections will be performed in a manner which minimizes interference with the operation of the Franchised Restaurant.

J. Interference With Employment Relations of Others

Franchisee will not attempt, directly or indirectly to entice or induce, or attempt to entice or induce any employee of BKC or of another franchisee of BKC to leave such employment nor to emplcy such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.

5. SERVICES AVAILABLE TO FRANCHISEE

BKC agrees to periodically advise and consult with FRANCHISEE in connection with the operation of the Franchised Restaurant and to provide to FRANCHISEE:

A. Standard plans and specifications for a free-standing building including furnishings, decor, layout and signs, together with advice and consultation. Any modifications for non-standard buildings, whether required by local zoning or building laws or otherwise, must be approved in writing by BKC and are to be paid for by FRANCHISEE.

B. A pre-opening training program conducted at BKC training facilities and Burger King Restaurants.

C. Pre-opening and opening supervision and assistance by personnel of BKC at FRANCHISEE's premises.

D. Opening promotion programs. FRANCHISEE's advertising and sales promotion payment for the first two full calendar months in which the Franchised Restaurant is open shall be available to implement grand opening promotions conducted within ninety (90) days after the Franchised Restaurant opens. Any additional costs incurred in implementing the programs shall be FRANCHISEE's responsibility.

E. BKC's confidential MOD Manual containing the standards, specifications, procedures and methods for operating a Burger King Restaurant, a copy of which will be loaned to FRANCHISEE for the term of this Agreement.

F. Such merchandising, marketing and advertising research data and advice as may be developed from time to time by BKC and deemed by it to be helpful in the operation of a Burger King Restaurant.

G. A standardized accounting, cost control and inventory control system.

H. Communication of new developments, techniques and improvements of BKC in food preparation, equipment, food products, packaging and restaurant management which are relevant to the operation of a Burger King Restaurant.

6. RESTAURANT SITE

The site at which FRANCHISEE shall operate the Franchised Restaurant is more fully described in Exhibit "A". During the term of this Agreement the site shall be used exclusively for the purpose of operating a franchised Burger King Restaurant.

In the event the building shall be damaged or destroyed by fire or other casualty, or be required to be repaired or reconstructed by any governmental authority, FRANCHISEE shall repair or reconstruct the building within a reasonable time under the circumstances. The minimum acceptable appearance for the restored building will be that which existed just prior to the casualty; however, every effort should be made to have the restored building reflect the then current image, design and specifications of Burger King Restaurants. If the building is

substantially destroyed by fire or other casualty, FRANCHISEE may, with BKC agreement, terminate this Agreement in lieu of FRANCHISEE reconstructing the building.

7. TRAINING

As a condition precedent to the Franchised Restaurant opening, FRANCHISEE and a designated restaurant manager must have successfully completed BKC's training program at locations specified by BKC. There shall be no charge for participation in the training program; however, FRANCHISEE shall be responsible for all travel and living expenses, compensation of and worker's compensation for himself and the manager while enrolled in the training program and any other personal expenses.

FRANCHISEE shall undertake and complete continuing training programs from time to time as may be directed by BKC in order to implement current operational standards.

FRANCHISEE shall implement a training program for Franchised Restaurant employees in accordance with training standards and procedures prescribed by BKC and shall staff the Franchised Restaurant at all times during the term of this Agreement with a sufficient number of trained employees including at least one (1) manager who has completed BKC's training program for restaurant managers at an accredited location to ensure that the Burger King operational standards are met. Requests for exemption from the manager training requirement will be considered on an individual basis and will be granted only in those situations where the employee has prior operational experience in a Burger King Restaurant and demonstrates to BKC a thorough knowledge and understanding of the Burger King System.

8. ROYALTIES AND ADVERTISING CONTRIBUTION

A. Royalties

FRANCHISEE agrees to pay to BKC a royalty of 3.5% of gross sales for the use of the Burger King System and the Burger King Marks. Royalties shall be paid monthly by the tenth (10th) day of each month based upon gross sales for the preceding month.

B. Advertising, Sales Promotion and Public Relations

In addition, FRANCHISEE shall pay to BKC an amount equal to 4% of FRANCHISEE's monthly gross sales by the tenth (10th) day of each month based upon FRANCHISEE's gross sales for the preceding calendar month. This sum, less direct administrative expenses, will be used for advertising, sales promotion and public relations both in the market area (A.D.I.) in which the Franchised Restaurant is located and on a national basis including creative, production, media and clearance costs of advertising and sales promotion materials and those market research expenditures directly related to the development and evaluation of the effectiveness of advertising and sales promotion. All such expenditures shall be at the discretion of BKC. The payments based upon sales during the first two (2) full calendar months of operation shall be allocated for approved grand opening promotions. Any portions of these sums not spent within six (6) months of the Franchised Restaurant opening shall then become a part of the A.D.I. market fund for the market area in which the Franchised Restaurant is located.

C. Gross Sales

The term "gross sales" as used in this Agreement includes all sums charged for goods, merchandise or services sold at or from the Franchised Restaurant, including all premiums unless exempted by BKC. The sale of Burger King products away from the Franchised Restaurant is not authorized; however, should any such sales be approved in the future, they will be included within the definition of gross sales. Gross sales excludes any federal, state, county or city tax, excise tax, or other similar taxes collected by FRANCHISEE from customers based upon sales, and cash received as payment in credit transactions where the extension of credit itself has already been included in the figure upon which the royalty and advertising contribution is computed.

D. Interest and Attorney's Fees

Any royalty and advertising and sales promotion contribution not paid when due shall bear interest at the maximum rate allowed by law. In any litigation to enforce the terms of this Agreement, the prevailing party shall be paid by the other party all costs, including attorney's fees, incurred as a result of the legal action.

9. ACCOUNTING PROCEDURES: RIGHT OF AUDIT

A. Accounting

FRANCHISEE agrees to keep complete records of his business and furnish BKC with a monthly and fiscal year to date profit and loss statement in the format prescribed by BKC. FRANCHISEE shall also submit to BKC quarterly balance sheets, the first of which shall be for the period ending three (3) months after the Franchised Restaurant opens. All profit and loss statements and balance sheets should be prepared in accordance with generally accepted accounting principles and shall be submitted to BKC within fifteen (15) days after the end

of the period covered by the report. In addition, FRANCHISEE shall submit to BKC copies of all state sales tax returns relating to sales at the Franchised Restaurant at the same time the returns are filed and such other records as BKC may reasonably request from time to time.

B. Annual Financial Statements

Within ninety (90) days after the close of each fiscal year, FRANCHISEE shall submit a full disclosure of all persons with any interest in the Franchised Restaurant and a complete annual financial statement, which statement, if requested by BKC, shall be certified by a Certified Public Accountant.

C. Audits

FRANCHISEE agrees that BKC or its representatives, at BKC's expense, shall, at all reasonable times, have the right to examine or audit the books or accounts of FRANCHISEE. FRANCHISEE shall retain sales records for a period of at least twenty-four (24) months. In the event a discrepancy is found between reported gross sales and actual gross sales which exceeds 5%, FRANCHISEE shall reimburse BKC for all costs of the audit including travel, lodging and wages.

D. Release of Financial Information

FRANCHISEE gives permission to BKC to release to FRANCHISEE's lenders or prospective landlord or lenders financial and operational information relating to FRANCHISEE and/or the Franchised Restaurant.

10. LIMITATIONS OF FRANCHISE

A. Trademarks, Trade Names, Service Marks and Trade Secrets

(1) FRANCHISEE acknowledges that ownership of all right, title and interest to the Burger King System, Burger King Marks, and the design, decor and image of Burger King Restaurants is and shall remain vested solely in BKC, and FRANCHISEE disclaims any right or interest therein or the good will derived therefrom. FRANCHISEE agrees that all materials loaned or otherwise made available to him and all disclosures made to him and not to the general public by or at the direction of BKC at any time before or during the term of this Agreement including, without limitation, the MOD Manual in its entirety, are to be considered trade secrets of BKC for purposes of this Agreement and shall be kept confidential and used by him only in the operation of the Franchised Restaurant and other licensed Burger King Restaurants. FRANCHISEE agrees that he shall not divulge any of the trade secrets to any person other than his employees and then only to the extent necessary for the operation of the Franchised Restaurant and will not, nor permit anyone to, reproduce, copy or exhibit any portion of the MOD Manual or any other confidential or proprietary information received from BKC.

(2) FRANCHISEE will not, directly or indirectly, at any time during the term of this Agreement or thereafter, do or cause to be done any act or thing disputing, attacking or in any way impairing or tending to impair BKC's right, title or interest in the Burger King Marks and the Burger King System. FRANCHISEE shall immediately notify BKC of all infringements or imitations of the Burger King Marks which come to his attention

or challenges to FRANCHISEE's use of any of the Burger King Marks, and BKC shall exercise absolute discretion in deciding what action, if any, should be taken. FRANCHISEE agrees to cooperate in the prosecution of any action to prevent the infringement, imitation, illegal use or misuse of the Burger King Marks and agrees to be named as a party in any such action if so requested by BKC. BKC agrees to bear the legal expenses incident to FRANCHISEE's participation in such action, except for the cost of FRANCHISEE's personal legal counsel if FRANCHISEE elects to be represented by counsel of his own choosing.

(3) In the adoption of a corporate or partnership name, FRANCHISEE shall not use any of the Burger King Marks, any variations or abbreviations, or any words confusingly similar to the Burger King Marks.

B. Independent Contractor

FRANCHISEE is an independent contractor and is not an agent, partner, joint venturer or employee of BKC, and no fiduciary relationship between the parties exists. FRANCHISEE shall have no right to bind or obligate BKC in any way nor shall he represent that he has any right to do so. BKC shall have no control over the terms and conditions of employment of FRANCHISEE's employees.

In all public records and in his relationship with other persons, on stationery, business forms and checks FRANCHISEE shall indicate his independent ownership of the Franchised Restaurant and that he is a franchisee of BKC. FRANCHISEE shall, if requested by BKC, exhibit on the premises in such places as may be designated by BKC, a notification that the Franchised Restaurant is operated by an independent operator and not by BKC.

11. UNFAIR COMPETITION

FRANCHISEE acknowledges the uniqueness of the Burger King System procedures, menu, strategies and materials, and that BKC is making its knowledge, know-how and expertise available to him only for the purposes of operating the Franchised Restaurant. FRANCHISEE agrees that it would be an unfair method of competition to use or duplicate any of the knowledge, know-how and expertise received from BKC for any use other than for the operation of franchised Burger King Restaurants. FRANCHISEE, therefore, warrants that during the term of this Agreement, he will utilize his best and continuing efforts to promote and develop the business at the Franchised Restaurant and during the term hereof and thereafter will not directly or indirectly engage in the operation of any restaurant, other than the Franchised Restaurant and other Burger King Restaurants licensed from BKC, which utilizes or duplicates the Burger King System or any part thereof.

12. INSURANCE: INDEMNIFICATION

A. FRANCHISEE agrees to carry at his expense during the term of this Agreement Comprehensive General Liability insurance, including Products Liability and Broad Form Contractual Liability, in an amount of not less than $1,000,000 per occurrence for bodily injury and $500,000 per occurrence for property damage, or in such other amounts as BKC may reasonably request. Each policy will name BKC and its subsidiaries as an additional insured, will provide that the policy cannot be cancelled without thirty (30) days prior written notice to BKC, and shall insure the contractual liability of FRANCHISEE under paragraph 12 C. Prior to the Franchised Restaurant opening, FRANCHISEE shall furnish to BKC a Certificate

of Insurance reflecting that the insurance coverage is in effect. All policies shall be renewed, and a renewal Certificate of Insurance mailed to BKC prior to expiration date.

B. FRANCHISEE agrees to secure and pay premiums on a Worker's Compensation policy covering himself and all his employees, as required by law.

C. FRANCHISEE is responsible for all losses or damages and contractual liabilities to third persons arising out of or in connection with possession, ownership or operation of the Franchised Restaurant, and for all claims or demands for damages to property or for injury, illness or death of persons directly or indirectly resulting therefrom; and FRANCHISEE agrees to defend, indemnify and save BKC and its subsidiaries harmless of, from and with respect to any such claims, demands, losses, obligations, costs, expenses, liabilities, debts or damages unless resulting from the negligence of BKC or defects in goods manufactured by BKC. BKC shall notify FRANCHISEE of any claims, and FRANCHISEE shall be given the opportunity to assume the defense of the matter. If FRANCHISEE fails to assume the defense, BKC may defend the action in the manner it deems appropriate, and FRANCHISEE shall pay to BKC all costs, including attorneys fees, incurred by BKC in effecting such defense, in addition to any sum which BKC may pay by reason of any settlement or judgment against BKC. BKC's right to indemnity under this Agreement shall arise notwithstanding that joint or concurrent liability may be imposed on BKC by statute, ordinance, regulation or other law.

13. TAXES

FRANCHISEE shall pay when due all taxes levied or assessed in connection with the possession, ownership

or operation of the Franchised Restaurant. In the event of any bona fide dispute as to the liability for a tax assessed against him, FRANCHISEE may contest the validity or the amount of the tax in accordance with procedures of the taxing authority; however, FRANCHISEE shall not permit a tax sale or seizure against the premises or equipment.

14. ASSIGNMENT: CONDITIONS AND LIMITATIONS

A. This Agreement and license are personal to FRANCHISEE, and FRANCHISEE shall not sell, assign or transfer this Agreement or any right or interest in the license granted, nor permit any such assignment or transfer to occur directly, indirectly or contingently by agreement or operation of law without the prior written consent of BKC. If FRANCHISEE consists of more than one (1) person, the requirement of BKC's prior approval shall apply to a transfer of all or part of one partner's interest to another partner. FRANCHISEE understands that this Agreement and the license granted may not be pledged, mortgaged, hypothecated, given as security for an obligation or in any manner encumbered. The assignment of any interest, except as provided in paragraphs 14 and 15, shall constitute a material breach of this Agreement.

B. In the event of the death of FRANCHISEE or, if this Agreement has been assigned to a corporation, the death of a stockholder, BKC shall consent to a transfer of decedent's interest to his heirs subject to the following conditions:

(1) The heir must complete and be approved through BKC's standard franchisee selection process including satisfactorily demonstating to BKC that he meets the financial, character, and managerial criteria, as well

as equity ownership and such other criteria and conditions as BKC shall then be applying in considering applications for new licenses.

(2) The heir shall agree, in writing, to assume liability for and to perform all the terms and conditions of this Agreement to the same extent as the original franchisee.

(3) If the heir is not approved, the deceased's estate shall use its best efforts to sell the Franchised Restaurant to an acceptable party within twelve (12) months from the date of FRANCHISEE's death, and BKC shall have an option, but not the obligation, to operate and/or manage the Franchised Restaurant for the account of FRANCHISEE's estate until the deceased FRANCHISEE's interest is transferred to another party acceptable to BKC. Should BKC elect to operate and/or manage the Franchised Restaurant, BKC shall make a complete accounting and shall forward the net income from the operation to FRANCHISEE's estate, less expenses and a reasonable management fee. If the conveyance of the Franchised Restaurant to a party acceptable to BKC has not taken place within the twelve (12) month period, BKC shall have the option to purchase the Franchised Restaurant at fair market value.

C. With the prior written consent of BKC, FRANCHISEE may assign this Agreement to a corporation in which he shall own 100% of the issued stock. BKC may impose reasonable conditions on such assignment, including without limitation:

(1) The assignment to a corporation will not relieve FRANCHISEE of personal liability to BKC for performance of all obligations under this Franchise Agreement.

(2) Any subsequent transfer or issuance of shares of the assignee corporation shall be subject to BKC's approval. In the case of an acquisition of additional shares by the operating partner, this requirement shall be satisfied by BKC being given written notice describing the transaction within seven (7) days following the transfer. At no time shall the assignee corporation have more than five (5) shareholders unless otherwise authorized in writing by the Chief Executive Officer of BKC.

(3) The assignee corporation shall not engage in any business activity other than that which is directly related to the operation of franchised Burger King Restaurants.

(4) FRANCHISEE (operating partner if FRANCHISEE consists of more than one (1) person) must remain the owner of not less than 50% of the outstanding stock after any transfer or issuance of shares of assignee corporation.

(5) The Articles of Incorporation and By-Laws of the corporation shall reflect the limitation in the number of shareholders and that the issuance and transfer of shares of stock are restricted and may be transferred only in accordance with the terms and conditions of this Agreement.

(6) All stock certificates shall include the following legend:

> The transfer of this stock is subject to the terms and conditions of a Franchise Agreement with Burger King Corporation. Reference is made to such Franchise Agreement and the restrictive provisions of the Charter and By-laws of this corporation.

15. RIGHT OF FIRST REFUSAL

A. In the event FRANCHISEE receives an acceptable bona fide offer from a third party to purchase the Franchised Restaurant, he shall give BKC written notice setting forth the name and address of the prospective purchaser, the price and terms of the offer together with a franchisee application completed by the prospective purchaser, a copy of the sales contract and such other information that BKC may request in order to evaluate the offer. BKC shall then have the prior option to purchase FRANCHISEE's interest covered by such offer at the price and upon the terms of such offer. In addition, FRANCHISEE agrees that, prior to acquiring any other Burger King Restaurant franchise which may be offered to him for sale or which he may offer to purchase, such franchise will first be offered to BKC on the same terms, conditions and price. If the consideration is not money, the purchase price shall be cash equal to the fair market value of the consideration. BKC shall have twenty (20) working days (excluding weekends and holidays) after receipt of FRANCHISEE's notice of offer and the furnishing of all requested information within which to notify FRANCHISEE of its intent to accept or reject the offer. Silence on the part of BKC shall constitute rejection. If the proposed sale includes assets of FRANCHISEE not related to the operation of franchised Burger King Restaurants, BKC may purchase only the assets related to the operation of franchised Burger King Restaurants or may also purchase the other assets, and an equitable purchase price shall be allocated to each asset included in the proposed sale. This right of first refusal shall apply to any transfer, conveyance, assignment, consolidation, merger or any other transaction in which legal or beneficial ownership of the license granted by this Agreement is vested in other than FRANCHISEE.

B. The election by BKC not to exercise its right of first refusal as to any offer shall not affect its right of first refusal as to any subsequent offer.

C. Any sale or attempted sale effected without first giving BKC the right of first refusal described above shall be void and of no force and effect.

D. If BKC does not accept the offer to purchase the Franchised Restaurant, FRANCHISEE may conclude the sale to the purchaser who made the offer provided BKC's consent to the assignment be first obtained, which consent will not be unreasonably withheld upon compliance with the conditions imposed by BKC on the assignment. Conditions on assignment may include without limitation:

(1) All obligations of FRANCHISEE to BKC, whether arising under this Agreement or otherwise, must be satisfied at the time of transfer.

(2) Prospective purchaser must complete and be approved through BKC's standard franchisee selection process including satisfactorily demonstrating to BKC that he meets the financial, character, managerial, equity ownership and such other criteria and conditions as BKC shall then be applying in considering applications for new licenses.

(3) Approval by BKC of the terms and conditions in the contract of sale which affect the sufficiency of cash flow from the business after payment of debt service necessary for reinvestment in the business for refurnishing, maintaining and remodeling the premises.

(4) Prospective purchaser shall have satisfactorily completed BKC's training for new franchisees.

(5) FRANCHISEE seller shall remain personally liable to BKC for royalty and advertising payments; how-

ever, FRANCHISEE seller will be released from personal liability if the assignee remains current in all financial obligations to BKC throughout the period, including any extensions, in which the assignee is making any payments to FRANCHISEE seller under an obligation incurred in connection with the sale, or for a period of twenty-four (24) months, whichever is longer. The contract of sale must provide that installment payments of the purchase price shall be subordinate to royalty and advertising payments called for in this Agreement.

(6) BKC shall be paid an assignment fee of Two Thousand Dollars ($2,000) for the costs and expenses incurred by BKC in connection with the transfer.

(7) Execution by FRANCHISEE seller of a general release of BKC in a form satisfactory to BKC.

16. DEFAULT AND EFFECT OF TERMINATION

A. Default

If an act of default occurs and FRANCHISEE fails to cure the default within the cure period specified and if no time is specified then within thirty (30) days of notice of default, BKC may, at its option and without prejudice to any other rights or remedies provided for hereunder or by law terminate the license granted herein. If any applicable law or rule requires a greater prior notice of termination, the prior notice required by such law or rule shall be substituted for the notice requirements herein. The following shall be an act of default:

(1) FRANCHISEE fails to maintain and operate the Franchised Restaurant in accordance with the standards and specifications established by BKC as to service, cleanliness, health and sanitation, knowingly sells any

product which does not conform to BKC's specifications, fails to sell products designated by BKC, or sells products not approved by BKC. FRANCHISEE shall have five (5) days after notification to cure the default.

(2) FRANCHISEE fails to pay when due any royalty or advertising and sales promotion contribution required to be paid under this Agreement. FRANCHISEE shall have ten (10) days after notification to cure the delinquency.

(3) FRANCHISEE fails to submit any financial statement when required, or submits a financial statement which understates gross sales.

(4) FRANCHISEE voluntarily abandons the franchise relationship. The closing of the Franchised Restaurant other than with the consent of BKC shall be considered a voluntary abandonment of the franchise relationship. If this act of default shall occur, BKC shall have the right to immediately terminate the license.

(5) FRANCHISEE ceases to occupy the premises. If the loss of possession is the result of governmental exercise of eminent domain, FRANCHISEE may with BKC's consent and subject to availability relocate to other premises in the same market area for the balance of the term of this Agreement.

(6) FRANCHISEE (if Franchisee consists of more than one person, the operating partner or the partnership, and if the franchise has been assigned to an operating corporation, the corporation) files a petition or application seeking any type of relief under the Bankruptcy Act or any state insolvency or similar law, or someone files a petition or application seeking to have FRANCHISEE adjudicated a bankrupt, or seeking other relief against FRANCHISEE

under the Bankruptcy Act or any state insolvency or similar law and the petitioner application is not dismissed within ninety (90) days after it is filed. The Franchise shall terminate upon the occurrence of this act of default as if that date were the expiration date and FRANCHISEE expressly and knowingly waives any rights that he may have under the provisions of the Bankruptcy Rules and consents to the termination of this Agreement or any other relief which may be sought in a Complaint filed by BKC to lift the provisions of the automatic stay of the Bankruptcy Rules. Additionally, FRANCHISEE agrees not to seek an Injunctive Order from any court in any jurisdiction relating to insolvency, reorganization or arrangement proceedings which would have the effect of staying or enjoining this provision.

(7) FRANCHISEE admits in writing his inability to pay his debts as they mature or makes an assignment for the benefit of creditors, or a receiver (permanent or temporary) for any part of his property is appointed by a court of competent authority.

(8) A final judgment against FRANCHISEE remains unsatisfied of record for thirty (30) days (unless a supersedeas or other appeal bond has been filed) or if a levy of execution is made upon the license granted by this Agreement or upon any property used in the Franchised Restaurant, and it is not discharged within five (5) days of said levying.

(9) Conviction of FRANCHISEE in a court of competent jurisdiction of an indictable offense punishable by a term of imprisonment in excess of one (1) year directly related to the business conducted pursuant to this franchise.

(10) FRANCHISEE utilizes or duplicates the Burger King System in violation of paragraph 11 or discloses any portion of the MOD Manual in violation of paragraph 10A (1).

(11) FRANCHISEE denies BKC the right to inspect the Franchised Restaurant or to examine his books.

(12) Conduct by FRANCHISEE which is deleterious to or reflects unfavorably on FRANCHISEE or the Burger King Restaurant System.

(13) Failure by FRANCHISEE to maintain a responsible credit rating by failing to make prompt payment of undisputed bills, invoices and statements from suppliers of goods and services to the Franchised Restaurant.

(14) The assignment or transfer of any interest of FRANCHISEE in this license in violation of paragraphs 3, 14 and 15.

(15) Failure to restore the building after damage or destruction as provided in paragraph 6.

(16) The submission by FRANCHISEE of a franchise application and/or management commitment form which contains any false or misleading statements or omits any material fact necessary in order to make the statements made not misleading.

(17) Repeated breaches of provisions of this Agreement.

(18) The acquisition of an interest in a restaurant business in violation of paragraph 17.

(19) Failure by FRANCHISEE to comply with any other provisions of this Agreement.

The failure of BKC to terminate this Agreement upon the occurrence of one or more events of default will not constitute a waiver or otherwise affect the right of BKC

to terminate this license because of a continuing or subsequent failure to cure one or more of the aforesaid events of default or any other default.

B. Effect of Termination

(1) Upon termination or expiration of this Agreement, FRANCHISEE's right to use the Burger King Marks and the Burger King System shall terminate. FRANCHISEE shall not thereafter identify himself as a Burger King franchisee or publicly identify himself as a former Burger King franchisee or use any of BKC's trade secrets, operating procedures, promotional materials, Marks or any mark confusingly similar. Upon termination or expiration of this license, FRANCHISEE will immediately return to BKC the MOD Manual loaned to him, together with all other material containing trade secrets, restaurant operating instructions or business practices of BKC.

(2) FRANCHISEE grants to BKC, upon termination or expiration of this Agreement, the option to purchase all usable paper goods, containers and printed menus bearing BKC's trade names or Marks at FRANCHISEE's cost, and to purchase the restaurant equipment, furniture, fixtures and signs at fair market value.

(3) If the parties do not enter into a successor Franchise Agreement, FRANCHISEE agrees to immediately upon termination or expiration of this Agreement, make such removals or changes in signs and the building as BKC shall request, so as to effectively distinguish the premises from its former appearance and from any other Burger King Restaurant. In the event FRANCHISEE fails to make the changes, FRANCHISEE consents to BKC entering the premises to make non-structural changes at FRANCHISEE's expense.

(4) In the event of termination for any default of FRANCHISEE, any damage suffered by BKC shall be a lien in favor of BKC against the personal property, machinery, fixtures and equipment owned by FRANCHISEE on the premises at the time of such default.

17. RESTRICTIVE COVENANT

FRANCHISEE agrees that during the term of this Agreement he will not have any interest in any restaurant business which is the same or similar to Burger King Restaurants. For a period of one (1) year after termination or expiration of this Agreement, and within two (2) miles of the premises of the Franchised Restaurant, FRANCHISEE will not have any interest in any restaurant business the same as or similar to a Burger King Resturant.

18. MISCELLANEOUS: GENERAL CONDITIONS

A. Interpretation

The introduction shall be considered a part of this Agreement. Paragraph captions are used only for convenience and are in no way to be construed as part of this Agreement or as a limitation of the scope of the particular paragraphs to which they refer. Words of any gender used in this Agreement shall include any other gender, and words in the singular shall include the plural, where the context requires.

B. Non-Waiver

The failure of BKC to exercise any right or option given to it under this Agreement, or to insist upon strict compliance by FRANCHISEE with the terms of this Agreement, shall not constitute a waiver of any terms or conditions of this Agreement with respect to any other or

subsequent breach, nor a waiver by BKC of its right at any time thereafter to require exact and strict compliance with the terms of this Agreement. The rights or remedies set forth in this Agreement are in addition to any other rights or remedies which may be granted by law.

C. Governing Law

(1) This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State of Florida. The choice of law designation does not require that all suits concerning this Agreement be filed in Florida.

(2) Anything in this Agreement to the contrary notwithstanding, FRANCHISEE shall conduct his business in a lawful manner and faithfully comply with applicable laws or regulations of the state, city or other political subdivision in which the Franchised Restaurant is located.

D. Severability

BKC and FRANCHISEE agree that if any provision of this Agreement may be construed in two ways, one of which would render the provision illegal or otherwise voidable or unenforceable and the other of which would render the provision valid and enforceable, such provision shall have the meaning which renders it valid and enforceable. The language of all provisions of this Agreement shall be construed according to its fair meaning and not strictly against BKC or FRANCHISEE. It is the desire and intent of BKC and FRANCHISEE that the provisions of this Agreement be enforced to the fullest extent, and should any provision be invalid or unenforceable under

Florida law, but valid under the laws of the state where the Franchised Restaurant is located, the provision shall be governed by the law of that state. In the event any court shall determine that any provision in this Agreement is not enforceable as written, BKC and FRANCHISEE agree that the provision shall be amended so that it is enforceable to the fullest extent permissable under the laws and public policies of the jurisdiction in which enforcement is sought. The provisions of this Agreement are severable and this Agreement shall be interpreted and enforced as if all completely invalid or unenforceable provisions were not contained in the Agreement, and partially valid and enforceable provisions shall be enforced to the extent that they are valid and enforceable.

E. Notices

(1) All notices to BKC shall be in writing and shall be delivered or sent by registered or certified mail, postage fully prepaid, addressed to it at its offices at P.O. Box 520783, General Mail Facility, Miami, Florida 33152, Attention: General Counsel, or at such other address as BKC shall from time to time designate in writing.

(2) All notices to FRANCHISEE shall be in writing and shall be hand delivered or sent by registered or certified mail or telegraph, addressed to FRANCHISEE at the Franchised Restaurant premises or FRANCHISEE's last designated in writing mailing address.

(3) Notices shall be deemed delivered on the earlier of actual receipt or the third (3rd) day after being deposited in the U.S. mail.

F. Liability of Multiple Franchisees

If FRANCHISEE consists of more than one person, each partner's liability under this Agreement shall be joint and several.

G. Modification

This Agreement may only be modified or amended by a written document.

H. Binding Effect

This Agreement shall be binding upon the parties, their heirs, executors, personal representatives, successors or assigns.

I. Survival

Any provisions of this Agreement which impose an obligation after termination or expiration of this Agreement shall survive the termination or expiration of this Agreement and be binding on the parties.

BURGER KING CORPORATION
By: /s/ (Illegible)
Executive Vice President
Attest: Helen O. Donaldson
Assistant Secretary
(Corporate Seal)

Witnesses:

/s/ Stevie A. Bide

/s/ (Illegible)

.....

/s/ John Rudzewicz
John Rudzewicz

/s/ Brian MacShara
Brian MacShara
FRANCHISEE

EXHIBIT "A"

4983 Dixie Highway
Drayton Plains, Michigan

LEGAL DESCRIPTION

Land in the Township of Waterford, County of Oakland and State of Michigan, described as:

Lots 11 and 12 of Supervisor's Plat No. 6 of part of the West 1/2 of the Southwest 1/4 of Section 3 and part of the East 1/2 of the Southeast 1/4 of Section 4, Town 3 North, Range 9 East, Waterford Township, Oakland County, Michigan, according to the plat thereof as recorded in Liber 47 of Plats, Page 26, Oakland County Records. Also described as beginning at the Southeast corner of Lot 11 and proceeding thence South 46 degrees 03 minutes 00 seconds West 250.00 feet; thence North 43 degrees 57 minutes 00 seconds West 174.24 feet; thence North 46 degrees 03 minutes 00 seconds East 250.00 feet; thence South 43 degrees 57 minutes 00 seconds East 174.24 feet to the point of beginning.

Subject to any and all reservations, restrictions, easements, rights of way, limitations and conditions of record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(PLAINTIFF'S EXHIBIT 9)

(Burger King Logo)

Lease/Sublease
Agreement

LEASE/SUBLEASE

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LEASE OR SUBLEASE AGREEMENT

THIS AGREEMENT (the "Lease"), is made this 4 day of June, 1979 (the "lease date"), by and between BURGER KING CORPORATION, a Florida corporation, 7360 North Kendall Drive, Miami, Florida ("Lessor"), and JOHN RUDZEWICZ and BRIAN MacSHARA ("Lessee"), whose address is 4983 Dixie Highway, Drayton Plains, Michigan 48020. (The terms "Lessor" and "Lessee" shall mean respectively "Sublessor" and "Sublessee" whenever the context requires or permits it.)

In consideration of the covenants contained in this Agreement, the parties agree as follows:

I.

PROPERTY LEASED

§1.1 DEMISE. Lessor leases to Lessee and Lessee leases from Lessor the following property (the "land") along with the Burger King Restaurant (the "building") and other improvements to be constructed on it (collectively called "the premises").

Legal Description: See Exhibit "A" attached hereto and made a part hereof.

Commonly described as: Burger King Restaurant
#775
4983 Dixie Highway
Drayton Plains, Michigan
48020

subject to conditions and restrictions of record, if any.

§1.2 ERECTION OF BUILDING. Commencement of this Lease is conditioned on the completion of the building in accordance with plans and specifications prepared by

Lessor's architect. Lessor has agreed to construct or contract for the construction of the building promptly and to complete or contract to complete it as promptly as conditions will permit, but in any event before one hundred eighty (180) days from the lease date; provided, however, that this period shall be extended by any time lost in construction due to delays caused by strike, lockout, acts of God, shortage of materials, or other conditions beyond the control of Lessor. In the event the building is not completed within one (1) year from the date of this Lease, this Lease may be terminated at the option of either party, on fifteen (15) days' notice to the other party.

§1.3 COVENANT OF QUIET ENJOYMENT. The Lessor promises, subject to Lessee's performance of all of the terms and conditions of the Lease, that Lessee shall be entitled to the quiet and peaceful enjoyment and undisturbed possession of the premises for the term of this Lease.

II.

TERM

§2.1 TERM. The term of this Lease (the "term") shall commence upon the earliest of the following dates (the "commencement date"):

(a) the date 10 days following date of the issuance of a Certificate of Occupancy for the premises by appropriate governmental authorities; or

(b) the date 10 days following date of certification by the architect that the land has been improved and the building constructed is substantially in conformance with the plans and specifications; or

(c) the date Lessee opens for business.

The term of this Lease shall expire at midnight on the day preceding the 20th anniversary of the commencement date (the "original term expiration date") unless sooner terminated as provided in this Lease. The commencement date shall be designated by the parties in a form capable of being recorded among the public records of the county where the premises are located.

§2.2 POSSESSION. Possession of the premises shall be delivered to the Lessee on the commencement date. Lessee shall have the right, however, prior to the beginning of the term to install furniture, restaurant equipment, trade fixtures and personal property ("personalty"), as well as equipment to be incorporated into the structure of the building at its own risk and free from rent, provided such installation does not interfere with the construction of the building. Lessee agrees that from the commencement date, it shall carry on business at the premises continuously during the term of this Lease, except in the event of loss of possession due to acts of God or other causes beyond the control of Lessee, in which event the terms of paragraph 5.8 shall control.

§2.3 HOLDOVER. Any holdover at the expiration of the term with the written consent of Lessor shall be on a month to month basis, which tenancy may be terminated by Lessor giving Lessee not less than fifteen (15) days notice. During such holdover tenancy, Lessee agrees to pay Lessor on a monthly basis all increased rentals and other charges that would have been due under this Lease and agrees to continue to be bound by all of the terms of this Lease which are applicable at that time. In the event Lessee holds over without consent of Lessor, the rent during any holdover period shall be double the average rent that was due during the last year of the Lease term.

§2.4 END OF TERM. At the expiration of this Lease, the fixtures located on the premises shall become the property of the Lessor. If, at that time, Lessee has fully complied with Lease terms and conditions, Lessor hereby waives any right to claim any personalty owned by Lessee located on the premises. The personalty may then be removed by Lessee provided that the premises are restored to their original condition, normal wear and tear excepted. With respect to any fixtures owned by Lessee prior to expiration of this Lease, Lessor shall pay to Lessee (or, if Lessee is indebted to Lessor, Lessor shall credit Lessee) an amount equal to the fair market value of such fixtures, not to exceed the amount originally paid by Lessee for such fixtures.

III.

CONSIDERATION

§3.1 RENT. Lessee agrees to pay Lessor as rent for each month of the term the following amounts ("the minimum monthly rent") or 8-1/2% of that month's gross sales, whichever amount is greater. The minimum amount of rent due annually (the "minimum annual rent") is computed at 12 times the minimum monthly rent.

Minimum Monthly Rent

Years 1 through 2:	$4,166.66		ZL
Years 3 ~~through 20:~~	~~$5,286.58~~	$4,416.66	BK JR BM
Years 4 through 20	$5,286.58		BK JR BM

(a) *Minimum Monthly Rent.* The minimum monthly rent shall be payable in advance on the first day of each month. If the commencement date of this Lease is not on the first day of a calendar month, the rent for the first month and last month shall be prorated.

(b) *Monthly Percentage Rent.* Monthly percentage rent is the excess, if any, of 8-1/2% of monthly gross sales over the minimum monthly rent. Monthly percentage rent for each month shall be due and payable by the 10th day of the following month.

(c) *Gross Sales.* The term "gross sales" as used in this Agreement includes all sums charged for goods, merchandise or services sold at or from the premises. The sale of Burger King products away from the premises is not authorized; however, should any such sales be approved in the future, they will be included within the definition of gross sales. Gross sales excludes any federal, state, county or city sales tax, excise tax, or other similar taxes collected by Lessee from customers based upon sales, and cash received as payment in credit transactions where the extension of credit itself has already been included in the figure upon which any previous monthly percentage rent has been computed.

(d) *Late Charges.* All rent shall be paid to Lessor without notice or demand and without abatement, deduction or set-off, except as otherwise expressly provided in this Lease. All rental payments delinquent for a period in excess of thirty (30) days shall be subject to late charges of 8% per annum.

§3.2 FINANCIAL REPORTS

(a) *Monthly Accounting.* Within ten (10) days after the end of each calendar month of the term, Lessee shall deliver to Lessor a statement in writing on a form approved by the Lessor, setting forth all of the gross sales for the preceding month.

(b) *Annual Accounting.* Within ninety (90) days after the end of each full year of this Lease, the Lessee

shall deliver to Lessor a statement showing the sales made at the premises during the preceding year, which, if requested by Lessor, shall be certified by a Certified Public Accountant.

(c) *Records and Audit.* Lessee agrees to keep full, true and accurate records and books of accounts of all transactions connected with its business. Lessor shall have the right to examine and inspect the books and records of Lessee at any reasonable time during normal business hours in order to verify the accuracy of statements rendered by the Lessee.

§3.3 ADDITIONAL CHARGES. Lessee and Lessor agree that the rent accruing under this Lease shall be net to Lessor and that all taxes, costs, common area maintenance fees, expenses and charges of every kind and nature ("additional charges") relating to the premises (except the taxes of Lessor referred to in §6.3 and any payments for interest or principal under any mortgage relating to the premises) which may arise or become due during the term or any extension of this Lease, shall be paid by Lessee, and that Lessee shall indemnify and save harmless Lessor from and against them. All additional charges which Lessee assumes or agrees to pay under any provisions of this Lease, together with all interest and penalties that may accrue on these additional charges in the event Lessee fails to pay them, as well as all other damages, costs and expenses, including, without limitation, reasonable attorneys' fees and other legal and court costs which Lessor may incur in enforcing this Lease, and any and all other sums which may become due by reason of Lessee's default or failure to comply with its obligations under this Lease, shall be deemed to be additional rent. In the event of non-payment, Lessor shall have all the rights and remedies as provided in the case of non-payment of rent.

IV.

INSURANCE

§4.1 COVERAGE. During the term, Lessee, at its own cost and expense, shall:

(a) Keep the premises and the fixtures and personalty on it insured with an all risk insurance policy in an amount sufficient to cover the cost of replacement (without deduction for depreciation). Such replacement cost shall be determined from time to time at the request of Lessor, but not more frequently than once in any thirty-six (36) consecutive calendar months. Replacement cost shall be determined by one of the insurers or, at the option of Lessor, by an appraiser, architect or contractor who is mutually and reasonably acceptable to Lessor and Lessee, and whom shall be retained and paid by Lessee.

(b) Provide and keep in force comprehensive general liability insurance against claims for personal injury, death or property damage occurring on, in or about the premises or the adjoining streets and property, in limits of not less than $1,000,000 per occurrence for bodily injury, not less than $500,000 per occurrence for property damage, or in such other amounts as Lessor may reasonably request.

(c) Provide and keep in force plate glass insurance covering the glass in the premises, unless waived by Lessor;

(d) If requested by Lessor, provide and keep in force rent insurance (and/or, as the case may require, use and occupancy insurance) in an amount not less than the minimum annual rent plus the estimated annual taxes, water charges, sewer rents and other assess-

ments and the annual premiums for the insurance required by this Article.

(e) If requested by Lessor or any mortgagee, provide and keep in force insurance for such other insurable hazards in such amounts as similarly situated premises are then commonly insured.

§4.2 POLICIES. All insurance required by Lessor and provided by Lessee shall be carried in favor of Lessor and Lessee, as their respective interests may appear, and any underlying lessor, fee owner, affiliate corporation, trustee, mortgagee or other person designated by Lessor. If requested by Lessor, insurance against fire or other casualty shall provide that the proceeds of any loss shall be payable to the mortgagee under a standard mortgagee clause. Any rent insurance or use and occupancy insurance carried by Lessee shall provide that, in the event of loss or damage to the premises, the proceeds shall be payable to Lessor to be held by Lessor as security for the payment of the rent and additional charges due under this lease until the premises are restored. All insurance shall be obtained from companies licensed to do business in the state in which the premises are located and which have at least a Class X rating by Best's Insurance Guide or are otherwise approved by Lessor. Lessee shall procure policies for all insurance for periods of not less than one year and shall deliver to Lessor all policies or certificates of insurance with evidence of payment of all premiums. Lessee shall procure renewals of these policies from time to time before their respective expiration dates. All insurance policies shall be nonassessable and shall require thirty (30) days notice by registered mail to Lessor of any cancellation or change affecting Lessor's coverage under the policies. All property damage and business interruption policies of Lessee shall contain a waiver of any subrogation rights

which Lessee's insurers may have against Lessor, even if the loss suffered is caused by the act, omission or negligence of Lessor.

§4.3 ADJUSTING; PROCEEDS. Claims for loss due to damage to the premises under any policies provided for in this Lease shall be adjusted with the insurance companies (a) by Lessee in the case of any particular casualty resulting in damage or destruction not exceeding $10,000, or (b) by Lessor and Lessee, in the case of any particular casualty resulting in damage or destruction exceeding $10,000 in the aggregate. Subject to the rights of any mortgagee, the proceeds of any insurance shall be payable as follows:

(1) With respect to any loss not exceeding $10,000 in the aggregate, proceeds shall be paid to Lessee, who shall hold them in trust for the purpose of paying the costs of repair and restoration; and

(2) With respect to losses exceeding $10,000 in the aggregate, the proceeds shall be paid to Lessor and shall be applied to pay the costs of repair and restoration.

§4.4 JOINT EFFORTS. Lessee and Lessor shall cooperate in attempts to collect any insurance proceeds that may be due in the event of loss, and Lessee shall execute and deliver to Lessor such proofs of loss and other instruments which may be required for the purpose of recovering these proceeds.

§4.5 WAIVER OF SUBROGATION. Lessee agrees to look solely to the proceeds of his own insurer for indemnity against exposure for loss of property or business interruption. Lessee warrants that its property and business interruption insurers shall have no rights against Lessor

by virtue of assignment, subrogation, loan agreement or otherwise.

§4.6 CANCELLATION OF INSURANCE. If any insurance policy covering the premises or any part of it is cancelled or is threatened by the insurer to be cancelled, or if the coverage thereunder is reduced in any way by the insurer for any reason, and if Lessee fails to remedy the condition giving rise to cancellation, threatened cancellation, or reduction of coverage within 48 hours after notice thereof by Lessor, Lessor may, at its option, either (i) reenter the premises forthwith by leaving upon the premises a notice in writing of its intention to do so (in which case the provisions of paragraph VIII shall apply) or (ii) enter the premises and remedy the condition giving rise to such cancellation, threatened cancellation or reduction, and Lessee shall forthwith pay the cost thereof to Lessor (which cost may be collected by Lessor as rent) and Lessor shall not be liable for any damage or injury caused to any property of Lessee or of others located on the premises as a result of any such entry.

§4.7 LOSS AND DAMAGE. Lessor shall not be liable for any death or injury occurring on the premises, nor for the loss of or damage to any of the personalty or other property of Lessee or of others by theft or otherwise, from any cause whatsoever. Without limiting the generality of the foregoing, Lessor shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, dampness, gas, electricity, water, rain, snow, or leaks from any part of the premises or from the pipes, appliances or plumbing works or from the roof, street or subsurface or from any other place by any other cause whatsoever. Lessor shall not be liable for any such damage caused by other persons or occupants of adjacent property, or the public, or caused

by operations in construction of any private, public or quasi-public work. All of the personalty or any other property of Lessee kept or stored on the premises shall be kept or stored at the risk of Lessee.

V.

THE PREMISES

§5.1 USE AND SERVICES. Lessee will operate a Burger King Restaurant on the premises in accordance with the terms of the Burger King Franchise Agreement entered into by Lessee contemporaneously with this Lease (the "Franchise Agreement"). The premises will be used for no other purpose. Lessee agrees that it will not use in connection with the operation of or as additional parking for its business on the premises any property other than the premises, except in accordance with the provisions of paragraph XIII. Notwithstanding anything in this Lease to the contrary, this Lease is conditioned upon the faithful performance by Lessee of the Franchise Agreement, and a default in the terms of the Franchise Agreement shall be a default of this Lease.

Except as may be otherwise specifically provided by the terms of this Lease or the Franchise Agreement, Lessor shall not be required to furnish to Lessee any facilities or services of any kind whatsoever, such as, but not limited to water, sewer, steam, heat, gas, hot water, electricity, light and power.

§5.2 REPAIRS AND MAINTENANCE. Lessee shall, at all times during the term, at its own costs and expense, keep and maintain the premises and all fixtures and personalty located on it in good order and condition, and subject to all applicable terms of paragraphs 5.3 and 5.8, shall make all necessary and desirable repairs, restorations

and replacements thereof, structural and nonstructural, seen or unforeseen (hereinafter collectively called "repairs"), and shall use all reasonable precaution to prevent waste, damage or injury. Lessee shall also maintain in good repair and free from dirt, snow, ice, rubbish and other obstructions or encumbrances, the sidewalks, parking areas, yards, plantings, gutters and curbs in front of and adjacent to the premises.

In the event that Lessee fails or neglects to make all necessary repairs or fulfill its other obligations as set forth above, Lessor or its agents may enter the premises for the purpose of making such repairs or fulfilling those obligations. All costs and expenses incurred as a consequence of Lessor's action shall be repaid by Lessee to Lessor within 15 days after Lessee receives copies of receipts showing payment by Lessor for such repairs or other obligations. These receipts shall be prima facie evidence of the payment of the charges paid by Lessor. Except in the case of emergency, Lessor shall give Lessee ten (10) days notice before taking any such action.

§5.3 ALTERATIONS. Lessee agrees that it will at its own cost and expense make such reasonable alterations to the interior or exterior of the premises as may reasonably be requested by Lessor from time to time in order to modify the appearance of the building to reflect the then current image of Burger King Restaurants.

Lessee shall not at any time make any alteration, change, addition or improvement (hereinafter collectively called "alterations") in or to the interior or exterior of the premises without the prior written consent of Lessor. In the event consent is given:

(a) the alterations shall be performed in a first class workmanlike manner at Lessee's sole expense, and

shall not weaken or impair the structural strength or lessen the value of the premises, or change the purpose for which premises may be used;

(b) the alterations shall be made according to plans and specifications therefor, which shall be first submitted to and approved in writing by Lessor;

(c) before the commencement of work on any alterations, such plans and specifications shall be approved by all governmental authorities having jurisdiction and any public utility company having an interest in the alterations;

(d) before the commencement of any alterations, Lessee shall pay the amount of any increase in premiums on insurance polices for endorsements covering the risk during work on the alterations, and workmen's compensation insurance covering all persons employed in connection with that work.

(e) if the estimated cost of the alteration exceeds $5,000.00, Lessee shall furnish to Lessor a surety bond of a company acceptable to Lessor, in an amount equal to the estimated cost of such work, or other security satisfactory to Lessor, guaranteeing the completion of such work, free and clear of all liens and encumbrances.

(f) before the commencement of any alterations which involve a contract for labor, services, materials, or supplies in excess of $5,000.00, Lessee shall deliver to Lessor, where permitted by law, either (1) a duplicate original of the contract, if in writing, which shall provide that no lien or claim against the premises or the equipment on it shall be created or filed as a result of performance of work under the contract

or (2) a written waiver by the architect, engineer, contractor, subcontractor, materialman, mechanic, or other person contracting to furnish such labor, services, materials or supplies, of all lien rights which he or it might otherwise have against the premises or Lessor's interest in it.

All buildings, additions, improvements, fixtures and appurtenances in or on the premises at the commencement date and those which may be erected, affixed or installed in or on the premises during the term are deemed to be and shall immediately become part of the premises and the sole property of Lessor. All personalty installed by Lessee (except signs, trademarks and other insignia of Lessor) shall remain the property of Lessee.

§5.4 LIENS. Should Lessee cause any alterations or repairs to be made to the premises, or cause any labor to be performed or material to be furnished, neither Lessor nor the premises shall under any circumstances be liable for the payment of any expense incurred, and all such alterations and repairs shall be made and performed at Lessee's expense. If, because of any act or omission of Lessee, any mechanic's or other lien, charge, claim or order for the payment of money shall be filed against the premises or against Lessor, Lessee shall, at its own cost and expense, cause it to be cancelled and discharged of record or bonded within fifteen (15) days after notice of filing thereof. In the event that the Lessee fails to cause any such mechanics' or other lien, charge or order to be cancelled and discharged or bonded, then, in addition to any other right or remedy of the Lessor, the Lessor may, at its option, cancel or discharge it by paying the amount claimed to be due into Court or directly to any claimant and the amount so paid by Lessor and all costs and expenses including attorneys' fees incurred for the cancella-

tion or discharge of such lien shall be due from the Lessee to the Lessor as an additional charge payable on demand.

§5.5 SIGNS. Lessee shall not place any signs or symbols on any portion of the premises without the prior written approval of Lessor.

§5.6 INSPECTION. Fee owner, Lessor or their representatives shall have the right to enter the premises at reasonable hours of any business day to ascertain if the premises are in proper repair and condition.

§5.7 LICENSE AND LAWS. The Lessee shall, at its own cost and expense, obtain all necessary licenses and/or permits which may be required for the conduct of its business; and Lessee shall, at its own cost and expense, promptly observe and comply with all present and future laws, ordinances, requirements, orders, directions, rules and regulations (referred to generally as "regulations") of governmental authorities having or claiming jurisdiction over the premises or the conduct of Lessee's business. Lessee may contest in good faith, after notice to Lessor, by appropriate proceedings conducted promptly at Lessee's own expense, in Lessee's name (and/or whenever necessary and with Lessor's consent, in Lessor's name), the validity or enforcement of any such regulation; provided that (i) such contest or any associated deferment of payment does not subject Lessor to a fine or other criminal liability, or subject the premises to any encumbrance, (ii) Lessee diligently prosecutes such contest to a final determination by the governing authority, and (iii) Lessee furnishes Lessor with any security that Lessor may reasonably request in connection with such contest.

§5.8 DAMAGE OR DESTRUCTION. If, during the term, the premises or the personalty or fixtures on it are destroyed or damaged in whole or in part by fire or other cause, Lessee shall give Lessor immediate notice, and

Lessee, at its own cost and expense, shall cause the prompt repair, replacement and rebuilding of same ("restoration"), subject to paragraphs 5.2 and 5.3 of this Lease. The restored building, personalty or fixtures shall reflect the then current image of Burger King Restaurants and conform to the then current design and specifications of Lessor. Lessor shall in no event be called upon to repair, replace or rebuild any such buildings, fixtures or personalty, nor to pay any of the costs or expenses thereof beyond or in excess of any insurance proceeds, as provided in this Lease.

All insurance proceeds received by Lessor or by any Insurance Trustee on account of such damage or destruction, less the actual cost, fees and expenses, if any, incurred in connection with adjustment of the loss, shall be applied by Lessor to pay or reimburse Lessee for the payment of the cost of the restoration, including the cost of temporary repairs or for the protection of property pending the completion of permanent restoration, and shall be paid out from time to time as restoration progresses upon the written request of Lessee, accompanied by evidence satisfactory to Lessor that:

(a) (1) the sum then requested either has been paid by Lessee or is justly due to contractors, subcontractors, materialmen, or other persons who have rendered services or furnished materials for the restoration pursuant to a certificate or claim for payment ("certificate"), and that the sum then requested does not exceed the amount of the services and materials described in the certificate;

(2) except for the amount, if any, stated in the certificate to be due for services or materials, there is no outstanding indebtedness known to the persons

signing such certificate, after due inquiry, which is then due for labor, wages, materials, supplies, or services in connection with the restoration;

(3) the cost of the restoration required to be done does not exceed the insurance proceeds, and

(b) that there have not been filed against the premises any vendor's, contractor's, mechanic's, laborer's or materialman's statutory or similar lien ("liens") which has not been discharged of record, except those that will be discharged upon payment of the sum requested in the certificate, or bonded or contested in accordance with paragraph 5.4.

Upon compliance with the above provisions, Lessor or the Insurance Trustee shall, out of such insurance proceeds and such other funds as may have been made available, pay or cause to be paid to Lessee or its designee, the respective amounts due.

If the insurance proceeds and other funds deposited with Lessor or the Insurance Trustee, less the actual cost, fees and expenses, if any, incurred in connection with the adjustment of the loss, are insufficient to pay the entire cost of the restoration, Lessee will pay the deficiency. At least ten (10) days before the commencement of restoration, Lessee shall notify Lessor of its intention to restore the premises. During restoration, this Lease shall not terminate, nor shall the rental and other charges payable under this Lease be abated or be affected in any manner.

§5.9 WARRANTIES: DISCLAIMER. Lessor shall provide Lessee with the benefit of any warranties provided by the building contractor. Lessor expressly disclaims any other warranty, either express or implied, and Lessee acknowledges that neither Lessor nor its agents have made

any representations or promises with respect to the premises except as expressly set forth in this Lease, and no rights, easements or licenses are acquired by Lessee by implication or otherwise except as expressly set forth herein. The taking of possession of the premises by Lessee shall be conclusive evidence that the Lessee has accepted the premises "*AS IS*". Lessor agrees to cooperate with and assist Lessee in asserting claims against contractors or others providing work and/or services to the premises.

§5.10 CONTRACTS. Lessee shall not without Lessor's consent enter into any service contract or agreement relating to the furnishing of any services to the premises or the occupants of it unless such contract or agreement shall by its terms be terminable on no more than thirty (30) days notice or shall expressly provide that it shall not become binding on Lessor in the event that this Lease is terminated or expires. Lessee shall furnish Lessor with copies of all service contracts or agreements affecting the premises that are now in existence or that are subsequently entered into.

VI.

TAXES AND OTHER CHARGES

§6.1. PAYMENT. Lessee shall pay on or before the last day on which payment may be made without penalty or interest, all taxes, assessments, charges for public utilities, excises, levies, license and permit fees and other governmental impositions and charges of every kind and nature whatsoever ("charges"), which may be assessed, imposed, or become due and payable in connection with the ownership, occupancy or possession of the premises or the fixtures or personalty on it, or any charges which may be imposed in lieu of, or as a substitution for, any such charges. At any time after the time for payment of each charge,

upon Lessor's request, Lessee shall exhibit to Lessor satisfactory evidence of payment. All charges assessed or imposed for the fiscal periods in which the term of this Lease commences and terminates shall be apportioned.

§6.2. CONTESTS. Lessee has the right to promptly contest or review any of the charges by appropriate proceedings ("proceedings") at its own expense, and if necessary, with the prior written consent of Lessor, in the name of Lessor. Lessee may defer payment of a contested charge only if, before instituting any proceedings, Lessee furnishes to Lessor security satisfactory to Lessor and sufficient to cover the amount of each contested charge, with interest and penalties for the period which the proceedings may be expected to take. Notwithstanding the furnishing of security (other than a cash deposit), Lessee shall promptly pay each contested charge if, at any time, the premises or any part of it are in danger of being sold, forfeited or otherwise lost or Lessor becomes subject to criminal or any other liability for such non-payment; provided that in that event, if Lessee has made a cash deposit to Lessor, Lessor may pay each contested charge out of the deposit. When any contested charge is paid or cancelled, any balance of any cash deposit not so applied shall be repaid to Lessee without interest. All proceedings shall be begun as soon as possible after the imposition or assessment of any contested item and shall be diligently prosecuted to final adjudication. If there is any refund with respect to any contested charge based on a payment by Lessee, Lessee shall be entitled to it to the extent of such payment.

§6.3 LIMITATION; SUBSTITUTION. Nothing contained in this Lease shall be construed to require Lessee to pay any inheritance, estate, succession, transfer, gift, franchise, corporation, income or profit tax, or capital levy that is or may be imposed upon Lessor, its successors or assigns;

provided, however, that if at any time during the term of this Lease the methods of taxation prevailing at the commencement date are altered so that in lieu of or as a substitute for the whole or any part of the taxes, assessments, levies, impositions or charges (collectively "assessments") now levied, assessed or imposed ("imposed") on real estate and improvements thereon, there is imposed

(1) an assessment made wholly or partially as a capital levy, or

(2) an assessment measured by or based in whole or in part on the premises, or

(3) a license fee measured by the rent payable by Lessee under this Lease,

then to the extent that such assessments or portion thereof would be payable if the premises were the only asset of Lessor subject to the assessments, Lessee shall pay these assessments in the same manner as provided in this Lease for payment of real estate taxes.

§6.4 ESCROW FUND. If, during the term of this Lease, Lessor or any mortgagee requests Lessee to provide an escrow fund for payment of real estate taxes, Lessee agrees that upon such request it will promptly deposit with Lessor or its designated mortgagee, for each month or portion thereof since the due date of the previous tax bill, one-twelfth (1/12) of the latest year's tax obligation (the "monthly escrow sum"), and that it will continue to deposit the monthly escrow sum on the first day of each subsequent month, so that as each installment of real estate taxes becomes due and payable, Lessee will have deposited a sum sufficient to pay it. All of these deposits (the "escrow funds") shall be received and held in trust; provided, however, that unless otherwise required by law, Lessor

or its designated mortgagee shall not be required to maintain the escrow funds in a segregated account nor invest them in interest bearing accounts or securities nor pay any interest on them. When the real estate taxes become due and payable, Lessor or its mortgagee shall promptly pay them from the escrow funds and shall promptly forward to Lessee receipts or other satisfactory evidence of payment. In the event that the amount of the real estate taxes assessed or imposed against the premises has not been fixed at the time when any monthly escrow sum is due, the monthly escrow sum shall be one-twelfth (1/12) of the amount of real estate taxes assessed or imposed against the premises for the preceding year, subject to adjustment when the actual amount of the real estate taxes is ascertained. If required by Lessor or any mortgagee, the provisions of this paragraph shall be applicable to any additional charges due under this Lease.

VII.

INDEMNIFICATION

§7.1 Lessee shall indemnify and save Lessor harmless from and against all costs, expenses, liabilities, losses, damages, injunctions, suits, actions, fines, penalties, claims and demands of every kind or nature, including reasonable attorneys' fees, by or on behalf of any person, party or governmental authority whatsoever arising out of (a) any failure by Lessee to perform any of its obligations under this Lease, (b) any accident, injury or damage which occurs in or about the premises, however occurring, (c) any matter arising out of the condition, occupation, maintenance, alteration, repair, use or operation of the premises or any part of it, (d) the contest or challenge by Lessee of any imposed tax, assessment, or other charges, or (e) any

other matter arising from or relating to Lessee's occupation of the premises.

VIII.

ENFORCEMENT

§8.1 DEFAULT. Each of the following events is a default and a breach of this Lease by Lessee:

(a) If Lessee files a petition in bankruptcy, insolvency, dissolution or for reorganization or arrangement under the laws of the United States or of any state, or voluntarily takes advantage of any such law or act or is dissolved or makes an assignment for the benefit of creditors;

(b) If involuntary proceedings under any bankruptcy law or insolvency act or for the dissolution of a corporation are instituted against Lessee or if a receiver or trustee is appointed of all or substantially all of the property of Lessee and such proceedings are not dismissed or such receivership or trusteeship vacated within ninety (90) days after such institution or appointment;

(c) If Lessee vacates or abandons the premises or indicates its intention to do so;

(d) If this Lease or the estate of Lessee hereunder is transferred to any other person or party, except in a manner permitted by the terms of this Lease;

(e) If Lessee fails to pay Lessor any rent or other charge when it becomes due and payable and fails to make such payment within ten (10) days after notice thereof by Lessor to Lessee;

(f) If Lessee fails to perform any of its obligations under this Lease and such non-performance continues

for a period within which performance is required to be made by specific provision of this Lease or, if no such period is provided, for a period of thirty (30) days after notice thereof by Lessor to Lessee; or, if such performance cannot be reasonably had within such thirty day period, Lessee has not in good faith commenced such performance within such thirty day period or has not diligently proceeded therewith to completion;

(g) If the Lessee or any agent of Lessee falsifies any report required to be furnished to Lessor pursuant to the terms of this Lease and fails to notify Lessor of such falsification within sixty (60) days of submission of such report.

In the event of a default under subparagraphs (a), (b), (c) or (d), above, the term of this Lease shall automatically terminate without additional notice to Lessee. In the event a default under subparagraphs (e), (f) or (g), above, shall occur and be continuing after the notice period provided, Lessor has the right, in addition to any other rights or remedies it may have, to terminate this Lease without further notice to Lessee, and in such event the term hereof shall expire in the same manner and with the same force and effect, except as to Lessee's liability, as if the expiration of the time fixed in such notice was the original term expiration date.

§8.2 CURE BY LESSOR. After expiration of the applicable period of notice, or without notice in the event of any emergency, Lessor at its option may, but shall not be obligated to, make any payment required of Lessee or perform any obligation of Lessee, and the amount Lessor pays, or the cost of its performance, together with interest thereon at the highest legal rate permitted, shall be deemed

to be an additional charge payable by Lessee on demand. Lessor shall have the right to enter the premises for the purpose of correcting or remedying any default, but neither any expenditure nor any such performance by Lessor shall be deemed to waive or release Lessee's default or the right of Lessor to take such action as may be otherwise permissible in the case of default. The Lessor shall have no liability to the Lessee for any loss or damages resulting from any such action by the Lessor, and entry by the Lessor under the provisions of Article V or VIII shall not constitute breach of the covenant for quiet enjoyment or an eviction.

§8.3 SURRENDER; REENTRY; RELETTING. In the event of cancellation or termination of this Lease either by operation of law or otherwise, or in the event Lessor gives notice to Lessee to vacate the premises pursuant to a default of this Lease, Lessee agrees to immediately peacefully surrender the premises to Lessor, and if Lessee refuses to do so, Lessor may, among other things, reenter and repossess the premises, using such force for that purpose as may be necessary, and Lessee shall nevertheless remain and continue to be liable to Lessor in a sum equal to all rent, additional rent and other charges payable under this Lease through the original term expiration date. If Lessor shall so reenter, Lessor may repair and alter the premises in any manner as Lessor deems reasonably necessary or advisable, and/or may, at its election, let or relet the premises or any part of it for the whole or any part of the remainder of the term or for a longer period, in Lessor's name or as the agent of Lessee, and out of any rent collected or received from subtenants or as a result of such letting or reletting, Lessor shall first pay to itself the cost and expense of retaking, repairing and/or altering the premises, and the cost and expense

of removing all persons and property from the premises; second, pay to itself the cost and expense sustained in securing any new tenant, and if Lessor maintains and operates the premises, the cost and expense of operating and maintaining the premises; and, third, pay to itself any balance remaining on account of the liability of Lessee for the sum equal to all rent, additional rent and other charges due from Lessee through the original term expiration date. Should Lessor, pursuant to this paragraph, not collect rent which, after deductions is sufficient to fully pay to Lessor a sum equal to all rent, additional rent and other charges payable through the original term expiration date, the balance or deficiency shall, at the election of Lessor, be paid by Lessee on the first of each month.

§8.4 ACCELERATION. Whether or not Lessor relets the premises, Lessor may recover against Lessee as damages for loss of the bargain and not as a penalty, in addition to any other damages, an aggregate sum which, at the time of the termination of this Lease, represents the then present worth of the excess, if any, of (a) the sum of the rent, additional rent and all other charges payable by Lessee hereunder that would have accrued for the balance of the term, over (b) the amount of rent loss which Lessee proves that Lessor could reasonably avoid over the balance of the term.

§8.5 SUITS. Suit or suits for the recovery of the deficiency or damage or for any installment or installments of rent, additional rent or any other charge due under this Lease may be brought by Lessor at any time or, at Lessor's election, from time to time, and nothing in this Lease shall be deemed to require Lessor to wait until the original term expiration date to bring suit.

§8.6 WAIVER. Lessee hereby expressly waives service of any notice of intention to reenter. Lessee hereby waives any and all rights to recover or to regain possession of the premises or to reinstate or to redeem this Lease as permitted or provided by any statute, law or decision now or hereafter in force and effect. No receipt of moneys by Lessor from Lessee after the cancellation or termination of the Lease shall reinstate, continue or extend the Lease, or affect any prior notice given to Lessee or operate as a waiver of the right of Lessor to enforce the payment of rent and additional rent then due or subsequently falling due, or operate as a waiver of the right of Lessor to recover possession of the premises by suit, action, proceeding or other remedy, and any and all moneys so collected shall be deemed to be payments on account of the use and occupancy of the premises, or at the election of the Lessor, on account of Lessee's liability under this Lease.

§8.7 PROOF OF CLAIM. Nothing in this Article shall limit or prejudice the right of Lessor to prove and obtain as liquidated damages in any bankruptcy, insolvency, receivership, reorganization or dissolution proceeding an amount equal to the maximum allowed by any statute or rule of law governing such proceeding, whether or not such amount is greater, equal to or less than the amount of the damages referred to in any of the preceding sections.

§8.8 INJUNCTION. In the event of a breach or a threatened breach by Lessee of any of its Lease obligations, Lessor shall have the right to enjoin and restrain the breach and to invoke any remedy allowed by law or in equity, in addition to other remedies provided in this Lease.

§8.9 INDEPENDENT RIGHTS. The rights and remedies of Lessor are distinct, separate and cumulative, and no one of them, whether or not exercised by Lessor, shall be deemed to be to the exclusion of any of the others.

§8.10 NON-WAIVER. The failure of Lessor to insist upon strict performance of any of Lessee's obligations under this Lease shall not be deemed a waiver of any rights or remedies that Lessor may have and shall not be deemed a waiver of any subsequent breach or default by Lessee.

§8.11 WAIVER OF EXEMPTION FROM DISTRESS. Lessee agrees that notwithstanding anything contained in any statute, enactment or other law of the state in which the premises are located or of any other jurisdiction, none of the personalty located on the premises shall be exempt from levy for distress for rent in arrears, and that if Lessee makes any claim for such an exemption, this agreement may be pleaded as an estoppel against Lessee in any appropriate action.

IX.

NO RENT ABATEMENT

§9.1 Unless specifically provided in this Lease, no abatement, diminution, or reduction of rent, additional rent, charges or other compensation shall be claimed by or allowed to Lessee, or any persons claiming under Lessee, under any circumstances, whether for inconvenience, discomfort, interruption of business, or otherwise.

X.

CONDEMNATION

§10.1 ENTIRE AWARD. In the event that the premises or any part of it is taken in condemnation proceedings

or by exercise of any right of eminent domain (or by settlement agreement in lieu thereof between Lessor and those authorized to exercise such right), Lessor shall be entitled to collect the entire amount of any award made—without deduction for any estate vested in or owned by Lessee—subject only to the rights of any mortgagee and to Lessee's rights as set forth in this Lease. Lessee agrees to execute any and all documents that may be required to facilitate collection by Lessor of any and all such awards. Lessee shall have no right to participate in any condemnation proceedings or agreement except for the purposes described in §10.4.

§10.2 SUBSTANTIAL TAKING. If at any time during the Lease term, the whole or substantially all of the premises is taken or condemned, this Lease shall terminate and expire on the date on which title vests in the condemning authority, upon which the rent provided to be paid by Lessee shall be apportioned and paid to that date, and Lessee shall have no claim against Lessor for the unexpired term of this Lease or for damage or for any other reason whatsoever. For the purposes of this Section, "substantially all of the premises" shall be deemed to have been taken if, in the sole opinion of Lessor, the portion of the premises not taken cannot be repaired or reconstructed in such a way that, by using only the amount of the net award available from the taking, there remains a complete, rentable structure capable of producing a proportionately fair and reasonable net annual income after payment of all operating expenses, rent, additional rent and all other charges payable by Lessee, and after performance by the Lessee of all its obligations under this Lease.

§10.3 PARTIAL TAKING. In the event of a partial taking (any taking which is not "substantial"), this Lease

shall not terminate, and Lessee shall promptly proceed to restore the remainder of the building on the land (if affected by the taking) to a complete, independent and self-contained architectural unit, usable for the purposes contemplated by this Lease, and Lessor shall pay to Lessee, subject to the same provisions and limitations specified herein with respect to insurance proceeds, the cost of restoration, which payment shall in no event exceed a sum equal to the amount of any separate award made for such restoration. Any deficiency will be paid by Lessee. Such restoration shall be subject to and shall be performed in accordance with the provisions of Paragraph 5.3, except that any surety bond shall be in the amount, if any, by which the estimated cost of the work exceeds said separate award for the restoration. In the event that there is no separate award for restoration, the amount shall be fixed and settled by mutual agreement or by arbitration as provided in this Lease.

If this Lease does not terminate as provided in §10.2, the new minimum annual rent after the date of taking shall be the minimum annual rent payable by Lessee immediately prior to the taking, reduced by 13.4% of any portion of the award or awards recovered by Lessor which are applied to the reduction of any mortgage to which this Lease is subject and subordinate or are not otherwise applied to Lessee's cost of demolition, repair and restoration. The new minimum monthly rent shall be 1/12 (one-twelfth) of the new minimum annual rent.

§10.4 LESSEE'S INDEPENDENT AWARD. Nothing in this article shall preclude Lessee from pursuing any independent action permitted by law or from participating in the condemnation proceedings, but only for the purpose of securing an independent award for loss of business or damage to personalty.

XI.

SUBORDINATION

§11.1 This Lease shall be fully subordinate to any mortgage and/or collateral assignment of lease against the premises which the fee owner, Lessor and/or their assigns has or subsequently obtains upon the premises.

The Lessee hereby grants a power of attorney to the Lessor with full power to act as its attorney in fact and to execute on behalf of the Lessee any and all documents that may be required by a mortgagee and/or assignee evidencing the Lessee's full subordination of the Lessee's interest to any mortgage and/or collateral assignment of lease that may be entered into by Lessor, the fee owner or their assigns. Lessee hereby agrees to execute, without charging Lessor, any and all documents that it is requested to execute to evidence this subordination. However, Lessee shall not be required to execute any promissory notes or other evidences of indebtedness which would create any personal liability on behalf of Lessee.

XII.

ASSIGNMENT

§12.1 BY LESSOR. This Lease shall be fully assignable by the Lessor or its assigns.

§12.2 BY LESSEE. Neither Lessee, nor Lessee's successors or assigns, shall (unless expressly permitted in this Lease) assign, mortgage, give as security, pledge or encumber this Lease, in whole or in part, by operation of law or otherwise, or sublet the premises, in whole or in part, or permit the premises or any portion of it to be used or occupied by others, or enter into a management contract or other arrangement whereby the premises shall be

managed and operated by anyone other than the owner of Lessee's leasehold estate, without the prior consent in writing of Lessor in each instance. If this Lease is assigned or transferred, or if all or any part of the premises is sublet or occupied by anybody other than Lessee, Lessor may collect rent from the assignee, transferee, subtenant or occupant, and apply the net amount collected to the rent reserved in this Lease, but no such assignment, subletting, occupancy or collection shall be deemed a waiver of any covenant or condition of this Lease, or the acceptance of the assignee, transferee, subtenant or occupant as lessee, or a release of Lessee from the performance or further performance by Lessee of its obligations under this Lease, and Lessee shall continue to be liable for all its obligations under this Lease. The consent by Lessor to an assignment, mortgage, pledge, encumbrance, transfer, management contract or subletting shall not in any way be construed to relieve Lessee from obtaining the express consent in writing of Lessor in each instance to any subsequent similar action that the Lessee may intend to take. Providing Lessee remains liable for all its obligations under this Lease, Lessor shall consent to an assignment of this Lease to an individual, partnership or corporation to which the Franchise Agreement has been assigned.

§12.3 ASSUMPTION BY ASSIGNEE. An assignment made with Lessor's consent or as otherwise permitted shall not be effective until Lessee delivers to Lessor an executed counterpart of such assignment containing an agreement, in recordable form, executed by the assignor and the proposed assignee, in which the assignee assumes the performance of the obligations of the assignor under this Lease to the original term expiration date.

XIII.

ADDITIONAL PROPERTY

In the event Lessee (for purposes of this paragraph if Lessee is a group of more than one person the term "Lessee" shall mean any member of the Lessee group) or any corporation, partnership or other entity in which Lessee has an interest or any member of Lessee's immediate family (Lessee or such other person or entity shall hereinafter be referred to as "Vendee") acquires the right to purchase property which, in the sole opinion of Lessor, is capable of being used either as additional parking or for any other purpose connected with the operation of the premises ("additional property"), Lessor shall have an option to assume Vendee's right to purchase such property without cost or charge to Lessor. Vendee agrees to submit to Lessor a copy of the purchase or option contract and all other relevant documents within ten days after execution thereof and a reasonable period of time in advance of any scheduled closing date. Lessor shall have twenty days thereafter within which to notify Vendee of Lessor's intention to accept or reject its option. If Vendee's rights to purchase additional property are not assignable, or if Vendee purchases additional property without previously granting Lessor the option to acquire it, Lessor shall have the option to purchase the additional property from Vendee at Vendee's purchase price, under the terms of Lessor's standard property Purchase Agreement to be executed by Vendee and Lessor upon exercise of the option. Vendee agrees to submit to Lessor a copy of the purchase agreement and all other relevant documents within fifteen days after closing, and Lessor shall have thirty days thereafter within which to notify Vendee of its intention to accept or reject this option.

In the event Lessor acquires the additional property from Vendee as set forth above, Lessee and Lessor agree to enter into a Lease of that additional property under the then current terms of Lessor's standard Lease for additional property.

In the event Lessor fails to exercise its options as set forth above, then at such time as this Lease expires or is terminated, Lessor has the option, to acquire the additional property by purchasing it for its fair market value or 3 times Vendee's purchase price, whichever is less, under the terms of Lessor's standard property Purchase Agreement, to be executed by Vendee and Lessor upon exercise of the option. Lessor must notify Vendee of its election to exercise this option within thirty (30) days after expiration or termination of this Lease. Should Lessor and Vendee be unable to agree upon a purchase price within thirty days after Vendee is notified by Lessor that Lessor desires to exercise the option, Lessor and Vendee shall within ten days following the end of said thirty day period separately hire disinterested qualified real estate appraisers who are authorized to appraise property in the county where the additional property is located and who are members of either The Society of Real Estate Appraisers, The American Institute of Real Estate Appraisers or The American Society of Appraisers. If either Lessor or Vendee fails to appoint an appraiser within ten days after being notified of the appraiser retained by the other party, the single appraiser hired shall determine the fair market value of the property. If both parties select an appraiser, the two appraisers shall meet and attempt to agree on a fair market value of the property. If they are unable to agree on the value within fifteen days after the second appraiser was appointed, they shall select a third appraiser who shall determine the fair market value. Lessor and

Vendee shall be responsible for the fee charged by the respective appraisers they selected and shall split the cost of the third appraiser. If after being informed of the fair market value Lessor indicates that the purchase price is unacceptable, it may rescind its election to purchase the additional property, upon notice to Vendee within 20 days after being informed of the fair market value of the property, but must pay the total cost of the appraisal.

In the event Lessor acquires additional property from Vendee under either of the above options, Vendee shall furnish to Lessor evidence that he has good and marketable title to the additional property, and title shall be conveyed to Lessor in fee simple, free and clear of any liens, encumbrances or restrictions upon payment of the purchase price. Closing shall be within ninety (90) days after determination of the purchase price, subject to any extension permitted under the terms of Lessor's standard property agreement.

In the event Vendee acquires a lease, license or other right of any kind, save and except by purchase, to use or occupy additional property from any person other than Lessor, Vendee agrees that, at such time as this Lease expires or is terminated, Lessor has the option, exercisable within thirty (30) days of such expiration or termination by notice to Vendee and at no cost or charge to Lessor, to assume such lease, license or other right to use or occupy such additional property from Vendee and Vendee hereby agrees to execute and provide such documents and other assurances reasonably required by Lessor to give full force and effect to this provision.

For purposes of this paragraph, notice to the Lessee in the manner indicated in Section 14.2 shall be deemed to be notice to Vendee.

XIV.

MISCELLANEOUS

§14.1 ARBITRATION. In the event of arbitration under §10.3 of this Lease, the arbitration shall be held in the City of Miami, Florida, in accordance with the rules of the American Arbitration Association requiring the appointment of three (3) arbitrators.

§14.2 NOTICES. Every notice, approval, consent or other communication authorized or required by this Lease shall be effective if given in writing and if hand delivered or sent by United States Registered or Certified Mail, Return Receipt Requested, with postage prepaid, and addressed directly to Lessor at its offices at P. O. Box 520783, General Mail Facility, Miami, Florida 33152, and to Lessee at the premises, or at such other address as either party shall from time to time designate in writing. Every notice shall be deemed to be effective upon delivery, if delivered, or on the second business day after mailing, if mailed. All payments to the Lessor shall be made at the address designated for notices to the Lessor.

§14.3 CONSTRUCTION. In the event that any of the provisions of this Lease shall by court order be held invalid or in contravention of any of the laws of the United States or of any state having jurisdiction over the subject matter or of any dispute arising under it, such invalidation shall not serve to affect the remaining portion of this Lease. To the extent permitted by the laws of the state where the premises are located, this Lease shall be governed by and construed in accordance with the laws of the State of Florida.

§14.4 SUCCESSORS. This contract shall bind Lessor and Lessee and their successors, heirs, assigns, administrators, and legal representatives, as the case may be.

§14.5 RECORDING. Lessee shall upon request of Lessor execute a short form of this Lease on a written document witnessed and acknowledged in a form capable of being recorded in the public records of the county where the premises are located. Lessee shall not record this Lease without prior written consent of Lessor.

§14.6 COUNTERPARTS. This agreement is being executed simultaneously in counterparts, any one of which shall be deemed an original.

§14.7 NO AGENCY. The parties hereto agree that the business relationship created by this Lease is solely that of Lessor and Lessee. Nothing contained in this Lease shall make Lessee an agent, legal representative, partner, subsidiary, joint venturer or employee of Lessor. Lessee shall have no right or power to, and shall not bind or obligate Lessor in any way, manner or thing whatsoever, nor represent that it has any right to do so.

§14.8 TIME OF THE ESSENCE. Time shall be of the essence in every part of this Lease.

§14.9 BINDING EFFECT. This agreement shall become immediately binding on the parties to this Lease on the date the last party signs it, notwithstanding that the term of this Lease shall commence upon a future date.

§14.10 HEADINGS. The table of contents preceding this Lease and the headings of the paragraphs and subparagraphs are inserted solely for the convenience of reference and shall not constitute a part of this Lease, nor limit, define or describe the scope or intent of this Lease.

§14.11 JOINT AND SEVERAL LIABILITY. If Lessee consists of more than one person, each individual's liability under this Lease shall be joint and several.

§14.12 DEFINITIONS.

(a) The term "Lessor" as used in this Lease shall mean the owner in fee of the premises for the time being, or the owner of the leasehold estate created by an underlying lease, or the mortgagee of the fee or of such underlying lease in possession for the time being, so that in the event of any sale or sales of the premises, or of the making of any such underlying lease, or of any transfer or assignment or other conveyance of such underlying lease and the leasehold estate created by it, the seller, lessor, transferor or assignor shall be and is hereby entirely freed and relieved of all agreements, covenants and obligations of Lessor herein and it shall be deemed and construed without further agreement between the parties or their successors in interest or between the parties and the purchaser, lessee, transferee or assignee on any such sale, leasing, transfer or assignment that such purchaser, lessee, transferee or assignee has assumed and agreed to carry out any and all agreements, covenants and obligations of Lessor under this Lease.

(b) The term "Lessee" shall mean the lessee named in this Lease, and from and after any valid assignment or sublessee of Lessee's interest in this Lease pursuant to its provisions, the assignee or sublessee of this Lease.

(c) The term "mortgage" shall mean any mortgage, security interest, charge, deed of trust, or other similar encumbrance resulting from the financing or refinancing of the premises.

(d) The term "mortgagee" shall include any individual, firm, partnership, corporation, joint venture, investment trust bank or institution, or other business group or association lending funds to Lessor upon the security of the premises demised by this Lease

whether or not such mortgage is recorded, or upon Lessor's independent covenant not to otherwise encumber this Lease or the premises.

(e) The term "fixture" as used in this Lease means only that equipment used in conjunction with the building, including, without limitation, heating, ventilating and air conditioning systems, water heaters or softeners and items of similar nature, and does not include Lessee's restaurant equipment or other personalty.

The Lessor and Lessee have respectively signed this Lease as of the date indicated on the first page of this Lease

Witnesses for Lessor:

BURGER KING CORPORATION

/s/ Jean Willis

By: /s/ Z. (Illegible)
Executive Vice President

/s/ Allegra Ann Boyce

Attest: /s/ Helen O. Donaldson
Assistant Secretary

LESSOR
(Corporate Seal)

Witnesses for Lessee:

/s/ Stevie A. Bide

/s/ John J. Rudzewicz
John Rudzewicz

/s/ Karen D. Loy

/s/ Brian MacShara
Brian MacShara

LESSEE

(Jurats omitted in printing)

(Rudzewicz and MacShara signatures are notarized on June 4, 1979; Burger King signatures on June 22, 1979).

EXHIBIT "A"

4983 Dixie Highway
Drayton Plains, Michigan

LEGAL DESCRIPTION

Land in the Township of Waterford, County of Oakland and State of Michigan, described as:

Lots 11 and 12 of Supervisor's Plat No. 6 of part of the West 1/2 of the Southwest 1/4 of Section 3 and part of the East 1/2 of the Southeast 1/4 of Section 4, Town 3 North, Range 9 East, Waterford Township, Oakland County, Michigan, according to the plat thereof as recorded in Liber 47 of Plats, Page 26, Oakland County Records. Also described as beginning at the Southeast corner of Lot 11 and proceeding thence South 46 degrees 03 minutes 00 seconds West 250.00 feet; thence North 43 degrees 57 minutes 00 seconds West 174.24 feet; thence North 46 degrees 03 minutes 00 seconds East 250.00 feet; thence South 43 degrees 57 minutes 00 seconds East 174.24 feet to the point of beginning.

Subject to any and all reservations, restrictions, easements, rights of way, limitations and conditions of record.

ADDENDUM TO LEASE/SUBLEASE AGREEMENT

BETWEEN BURGER KING CORPORATION, LESSOR AND JOHN RUDZEWICZ AND BRIAN MacSHARA, LESSEE, DATED June 4, 1979

1. Notwithstanding anything as may be contained in Paragraph 9.1, Article 9 to the contrary, there shall be no rental abatement for the causes therein specified resulting in the Lessee's inability to conduct business upon the de-

mised premises by reason of such causes for a period of one (1) year from the cessation of business by reason of such causes. Upon the expiration of one (1) year, and for a period of thirty (30) days thereafter, should the lessee be unable to resume business operations through no fault of lessee, lessee shall have the option of continuing rental payments or upon notice in writing to lessor, terminate this lease.

2. This Addendum to Lease is being entered into in compliance with an administrative interpretation by the Corporation and Securities Bureau of the applicable laws, rules and regulations of the State of Michigan.

BURGER KING CORPORATION

By: /s/ Z. (Illegible)
Executive Vice President

/s/ Allegra Ann Boyce

Attest: /s/ Helen O. Donaldson
Assistant Secretary
LESSOR

/s/ Stevie [illegible]. Bide

/s/ John Rudzewicz
John Rudzewicz

/s/ Karen D. Loy

/s/ Brian MacShara
Brian MacShara
LESSEE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(DEFENDANTS' EXHIBIT M-C)

STATE OF MICHIGAN
DEPARTMENT OF COMMERCE
CORPORATION AND SECURITIES BUREAU

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, G. Ann Pitts, Certification Officer, Office of Franchise and Agent Licensing, Corporation and Securities Bureau, Michigan Department of Commerce, do hereby certify that a diligent search has been conducted for the franchise exemption notification request of the Burger King Corporation (File No. FE-75-14) pursuant to the Michigan Franchise Investment Law and that the Burger King Corporation had a Section 6(2)(a) exemption in effect for the period November 14, 1978 through November 14, 1979. A diligent search has been made for a notification of exemption pursuant to Section 6(2)(h) and Section 7 for the sale of the Burger King franchise to be located at 4983 Dixie Highway, Drayton Plains, Michigan, Store No. 775, to Brian MacShara and John Rudzewicz on June 4, 1979 and that no such records exist or are currently in the possession of the Corporation and Securities Bureau.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Corporation and Securities Bureau, Michigan Department of Commerce in the City of Lansing, this Twenty-First (21) day of December, 1981.

/s/ G. Ann Pitts
G. Ann Pitts, Acting Director
Office of Franchise and Agent Licensing

(Seal)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

COMPLAINT FOR DAMAGES

Plaintiff herein, BURGER KING CORPORATION, hereinafter referred to as "BKC", sues Defendants, Brian MacSHARA and JOHN RUDZEWICZ, hereinafter referred to as "franchisees" and alleges as follows:

ALLEGATIONS AS TO ALL COUNTS AND CLAIMS

1. This is an action for damages and other relief and jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1332, *Diversity of Citizenship*, and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. This is an action for damages and other relief and jurisdiction of this Court is conferred pursuant to the Trademark Laws of the United States, 15 U.S.C. §1121 and pursuant to the Judicial Code of the United States, 28 U.S.C. §1338(a) and §1338(b).

3. At all times material, plaintiff, BKC, was and is a Florida corporation organized and existing pursuant to the laws of the State of Florida with its principal place of business in Miami, Dade County, Florida.

4. At all times material, defendant, BRIAN MacSHARA, was and is a citizen and resident of the State of Michigan and is subject to the jurisdiction of this Court, as hereinafter alleged.

5. At all times material, defendant, JOHN RUDZEWICZ, was and is a citizen and resident of the State of Michigan and is subject to the jurisdiction of this Court, as hereinafter alleged.

6. Venue is proper in this district court in that in addition to the fact that plaintiff is a corporation organized and existing pursuant to the laws of the State of Florida with its principal place of business in Miami, Dade County, Florida, the claims hereinafter alleged by plaintiff against defendants accrued within the Southern District of Florida in that the hereinafter referred to Franchise Agreement and Lease or Sublease Agreement was made and entered into in Miami, Dade County, Florida, and it is these agreements which give rise to plaintiff's rights which are enforceable in this Court. In particular, the hereinafter referred to Franchise Agreement and Lease or Sublease Agreement required payments to be made by defendants to plaintiff at plaintiff's place of business in Miami, Dade County, Florida, and each of the hereinafter referred to failures of the respective defendants to make such payments as will be hereinafter more fully set forth, constitutes a breach of contract within this district court. Furthermore, the defendants have had substantial contacts within this district in that the hereinafter referred to Franchise Agreement and Lease or Sublease Agreement were delivered by the defendants to the plaintiff at its offices in Miami, Dade County, Florida, and in addition, defendant, BRIAN MacSHARA, attended the Burger King University Operations Course which is located in Miami, Dade County, Florida, and as such, said substantial and significant contacts by the defendants in this district established this district as the district in which the hereinafter alleged claims arose pursuant to 28 U.S.C. §1391(b).

7. On or about February 14, 1979, plaintiff and defendants entered into a preliminary agreement with reference to the plaintiff furnishing and/or granting and the defendants acquiring a franchise for the operation of a Burger King restaurant. Attached hereto and made a

material part hereof as plaintiff's Exhibit No. 1 is a copy of said preliminary agreement dated February 14, 1979.

8. On or about June 4, 1979, plaintiff and defendant entered into a Burger King Restaurant Franchise Agreement at Miami, Dade County, Florida; the said Franchise Agreement from plaintiff to defendants granted the defendants a franchise and/or license for a period of twenty years to use the BURGER KING SYSTEM and the BURGER KING MARKS in the operation of a Burger King restaurant (franchised restaurant) located at 4983 Dixie Highway, Drayton Plains, Michigan; said Burger King restaurant being Burger King restaurant No. 775. Attached hereto and made a material part hereof as plaintiff's Exhibit No. 2 is a copy of the aforedescribed Franchise Agreement dated June 4, 1979.

9. On or about June 4, 1979, plaintiff and defendants entered into a Lease or Sublease Agreement with reference to the aforedescribed property. Attached hereto and made a material part hereof as plaintiff's Exhibit No. 3 is a copy of the aforedescribed Lease or Sublease Agreement dated June 4, 1979.

10. On or about June 4, 1979, the aforedescribed Burger King restaurant No. 775 opened for business at 4983 Dixie Highway, Drayton Plains, Michigan, pursuant to the aforedescribed June 4, 1979 Burger King Restaurant Franchise Agreement and Lease or Sublease Agreement.

11. Pursuant to the aforedescribed Burger King restaurant Franchise Agreement, provision No. 8A, defendants agreed to pay to plaintiff a royalty of 3.5% of gross sales for the use of the BURGER KING SYSTEM and the BURGER KING MARKS. Said royalties were to be paid monthly by the tenth (10th) day of each month based upon gross sales for the preceding month. In addition, pursuant

to provision No. 8B of the aforedescribed Franchise Agreement, defendants agreed to pay the plaintiff an amount equal to 4% of defendants' monthly gross sales by the tenth (10th) day of each month based upon the defendants' gross sales for the preceding calendar month for advertising, sales promotion, and public relations. In addition, pursuant to provision No. 13 of the aforedescribed Franchise Agreement, the defendants were required to pay when due, all taxes levied or assessed in connection with the possession, ownership or operation of the aforedescribed restaurant.

12. Pursuant to the aforedescribed Lease or Sublease Agreement dated June 4, 1979, Section 3.1, the defendants agreed to pay to the plaintiff as rent for each month a minimum monthly rent or 8 1/2% of that months gross sales, whichever amount is greater. The aforedescribed minimum monthly rent payment was to be paid by defendants to plaintiff in advance on the first (1st) day of each month. In addition, pursuant to Section 6.1 of the aforedescribed Lease or Sublease Agreement, defendants were to pay all taxes in connection with the ownership, occupancy or possession of the aforedescribed restaurant.

13. Defendants, in addition to the above required payments, additionally purchased certain materials, supplies, and other items from plaintiff and from plaintiff's Distron Division and from plaintiff's Davmor Division and obligated themselves to make payments to the plaintiff for said purchases. Said defendants have failed to pay for said purchases, as required.

14. As of May 1, 1981, defendants are in default of the aforedescribed provisions of the aforedescribed Franchise Agreement and Lease or Sublease Agreement and in the payment of the aforedescribed additional purchases

in the amount of $163,604.54, which is owed by defendants to plaintiff.

15. Plaintiff has performed all conditions precedent with reference to the bringing of this action including all notice provisions to the defendants, pursuant to the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement including, but not limited to:

(a) Letter dated January 8, 1980 to defendant MacSHARA with reference to the delinquent accounts payable;

(b) Letter dated January 23, 1980 to defendants with reference to their default pursuant to paragraph 16 of the aforedescribed Franchise Agreement and pursuant to Section 8.1 of the aforedescribed Lease or Sublease Agreement;

(c) Letter dated June 5, 1980 to defendants with reference to the aforedescribed defaults and termination of the aforedescribed Franchise Agreement and Lease or Sublease Agreement;

(d) Letter dated March 13, 1981 to defendants with reference to the aforedescribed defaults of the aforedescribed Franchise Agreement and Lease or Sublease Agreement;

(e) Letter dated April 20, 1981 to defendants with reference to the aforedescribed defaults of the aforedescribed Franchise Agreement and Lease or Sublease Agreement and with reference to the termination of the aforedescribed Franchise Agreement and Lease or Sublease Agreement and further, with reference to said defendants default pursuant to the aforedescribed Franchise Agreement and Lease or Sublease Agreement. Attached hereto and made a material part hereof as plaintiff's composite Exhibit No. 4 A-E are copies of the aforedescribed letters.

16. Despite the aforedescribed defaults by defendants of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, and despite the aforedescribed letters to defendants from plaintiff with reference to said defaults and with reference to said termination of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, said defendants continued to use and still continue to use the BURGER KING MARKS and the BURGER KING SYSTEM and continue to identify themselves as a BURGER KING franchise and publicly identify themselves as a BURGER KING franchise and continue to use BKC's trade secrets, operating procedures, promotional materials, and Marks. In addition, said defendants have failed to return to the plaintiff any and all manuals and/or materials containing trade secrets, restaurant operating instructions, or business practices of the plaintiff pursuant to the aforedescribed Franchise Agreement.

17. Despite the aforedescribed defaults and termination of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, the defendants have failed to remove themselves from the aforedescribed restaurant and premises and have failed to return control and possession of the aforedescribed restaurant and premises to the plaintiff, despite the plaintiff's demands that they do so.

COUNT I

CLAIM AGAINST DEFENDANTS FOR BREACH OF CONTRACT

18. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

19. As a result of the aforedescribed actions and conduct of the defendants, said defendants are in default

of the aforedescribed Franchise Agreement, provision No. 16, in all of the following respects:

(a) Defendants have failed to maintain and operate the restaurant in accordance with the standards and specifications established by the plaintiff as to service, cleanliness, health, and sanitation, knowingly selling their product which does not conform to plaintiff's specifications, failing to sell products designated by plaintiff, and selling products not approved by plaintiff;

(b) Defendants have failed to pay when due royalties and/or advertising and/or sales promotion and/or public relations contributions and/or for additional purchases from Distron and Davmor required to be paid under the agreement;

(c) By engaging in conduct which is dilitarious [sic] to or reflects unfavorably on both defendants and plaintiff;

(d) By the defendants' failure to maintain a responsible credit rating by failing to make prompt payment of undisputed bills, invoices and statements from suppliers of goods and services to said restaurant;

(e) By the defendants' repeated breaches of the aforedescribed provisions of the Franchise Agreement;

(f) By the defendants' failure to comply with the termination provisions of the aforedescribed Franchise Agreement pursuant to provision No. 16B.

20. As a result of the aforedescribed defaults of the provisions of the aforedescribed Franchise Agreement, said defendants have breached said Franchise Agreement with plaintiff.

21. As a result of the actions and conduct of the defendants, said defendants are in default of the afore-

described Lease or Sublease Agreement in the following respects:

(a) By the defendants' failure to pay the plaintiff the rent and/or other charges, as aforedescribed and alleged when they became due and payable;

(b) By said defendants failure to perform the obligations of the Lease or Sublease Agreement and such nonperformance continuing for a period within which performance was required to be made by specific provision of the Lease Agreement or for a period of thirty (30) days after notice thereof, as aforedescribed and alleged.

22. As a result of the aforedescribed defaults of the aforedescribed Lease or Sublease Agreement, the defendants have breached the aforedescribed Lease or Sublease Agreement with the plaintiff.

23. As a direct and proximate result of the defendants' breach of the aforedescribed Franchise Agreement and the aforedescribed Lease or Sublease Agreement, plaintiff has been damaged as aforedescribed and alleged, in an amount in excess of the minimal jurisdictional limit of this Court and said defendants are indebted to the plaintiff for said amounts.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, together with costs and interest thereon and demands trial by jury.

COUNT II

CLAIM AGAINST DEFENDANTS FOR INTEREST AND ATTORNEYS' FEES

24. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

25. Pursuant to provision No. 8D of the aforedescribed Franchise Agreement, plaintiff is entitled to the aforedescribed damages in addition to all costs, including attorneys' fees incurred as a result of this litigation and, in addition, plaintiff is entitled to interest at the maximum rate allowed by law for any royalty and advertising and sales promotion contribution not paid when due as aforedescribed and alleged.

26. Pursuant to provision and/or section 3.3 of the aforedescribed Lease or Sublease Agreement, plaintiff is entitled to the aforedescribed damages in addition to all costs and expenses, including reasonable attorney's fees and other legal and court costs.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally and demands attorneys' fees and costs, plus interest, and demands trial by jury.

COUNT III

CLAIM AGAINST DEFENDANTS FOR OPEN ACCOUNT

27. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

28. As of May 1, 1981, defendants owe plaintiff the sum of $163,604.54, plus interest, according to the attached account which is attached hereto and made a material part hereof as plaintiff's Exhibit No. 5.

29. In addition, subsequent to May 1, 1981, defendants will owe to plaintiff additional sums for royalty payments, advertising payments, real estate taxes, and monthly rentals, all of which said sums and amounts will be continuing in their nature.

WHEREFORE, plaintiff demands judgment for damages against the defendants, jointly and severally, together with costs and interest and demands trial by jury.

COUNT IV

CLAIM AGAINST DEFENDANTS FOR AN ACCOUNT STATED

30. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

31. Before the institution of this action, plaintiff and defendants had the aforedescribed business transactions between them and on or about April 20, 1981, said plaintiff and defendants agreed to a resulting balance as of April 1, 1981, in the amount of $155,523.54.

32. Plaintiff rendered a statement of said resulting balance to defendants and said defendants did not and have not objected to said statement.

33. Accordingly, defendants owe plaintiff the sum of $155,523.54 as of April 1, 1981, that is due plus interest, on said account.

34. As aforedescribed and alleged, as of May 1, 1981, defendants owe plaintiff the sum of $163,604.54, which is evidenced by plaintiff's Exhibit No. 5, plus interest on said account. As aforedescribed and alleged, said outstanding balance will increase subsequent to May 1, 1981, as the aforedescribed charges for royalties, advertising, real estate taxes, and monthly rental payments, are continuing in their nature.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, together with costs and interest and demands trial by jury.

COUNT V

CLAIM AGAINST DEFENDANTS FOR TRADEMARK INFRINGEMENT

35. Plaintiff adopts and incorporates by reference all of the foregoing allegations and further avers:

36. Plaintiff, BURGER KING CORPORATION, is one of the world's largest restaurant organizations with more than 3,000 Burger King restaurants in the BURGER KING CORPORATION restaurant system.

37. Plaintiff's restaurants are located in all fifty (50) states within the United States and in several foreign countries. Many of the said restaurants are owned by plaintiff and many of said restaurants have been licensed or franchised to others, like the defendants herein, to operate.

38. In connection with this franchising, the right to use the BURGER KING CORPORATION trade names, trademarks, service marks, formula, designs, specifications, methods, trade secrets, marketing and advertising strategies and other property rights in the operation of BURGER KING restaurants is subject to and governed by the franchise agreements, like the Franchise Agreement entered into by and between the plaintiff and defendants in this cause and attached hereto as plaintiff's Exhibit No. 2.

39. Plaintiff has for many years invested substantial effort and money in developing original and distinctive features for use in its Burger King restaurants. These features include signs, symbols, colors, equipment and floor plan layouts of the premises, decorative accompaniments such as chairs, paper goods, unique employee uniforms utilizing distinctive red and gold colors and a limited menu featuring, among other things, hamburgers.

These features have been combined by plaintiff in its restaurants to create a distinctive business image. Plaintiff has spent hundreds of millions of dollars advertising and promoting the products and services of Burger King restaurants sold under its various trademarks and service marks. Through such advertising and promotion and through sales of quality products and services, plaintiff and its products and services have become widely known and favorably regarded by the purchasing and consuming public.

40. In addition to its valuable business image, plaintiff sells its products and services in the United States and in various foreign countries under various trademarks and service marks, including, but not limited to, the design mark comprising the words BURGER KING and the color red between two bun-halfs in the color gold. This mark (hereinafter referred to as the "bun-halfs logo") has been used by the plaintiff since at least as early as January, 1969, and is widely used and promoted by plaintiff in the advertising of its restaurants and the advertising and sale of its products and services. The bun-halfs logo has become a primary part of the plaintiff's business image.

41. In accordance with the provisions of federal law, plaintiff has registered the aforedescribed bun-halfs logo mark in the United States patent and trademark office and said registrations were duly and legally issued, and are valid and subsisting.

42. As aforedescribed and alleged, plaintiff and defendants entered into the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, which permitted the defendants to operate the aforedescribed Burger King restaurant No. 775 located in Drayton Plains, Michigan.

43. In the aforedescribed Burger King Restaurant Franchise Agreement attached hereto as plaintiff's Exhibit

No. 2, and dated June 4, 1979, defendants acknowledged in provision No. 10, that they had no part in the creation or development of plaintiff's trademarks, service marks and trade names, and they disclaimed any right or interest therein or to the goodwill derived therefrom, and said defendants warranted that they would not at any time question, dispute or attack the validity, right, title, or interest of the plaintiff as to its trademarks, service marks, trade names, patents and copyrights.

44. Pursuant to the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, said defendants agreed and acknowledged that upon termination of the aforedescribed franchise agreement, upon the occasion of a default, the following:

(a) The defendants' right to use, in any manner, the service marks and trademarks BURGER KING and HOME OF THE WHOPPER or any other mark registered by plaintiff or insignia or slogan used in connection therewith or any confusingly similar trademark, service mark, trade name or insignia would terminate forthwith;

(b) Said defendants would not directly or indirectly identify themselves in any manner as a present or former BURGER KING franchisee or use any of plaintiff's trade secrets, signs, symbols, devices, recipes, formulas, food mixes or other materials constituting a part of the BURGER KING SYSTEM;

(c) Defendants would immediately remove themselves from the aforedescribed restaurant and return control and possession of the aforedescribed restaurant to the plaintiff.

45. As aforedescribed and alleged, defendants have breached the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, by defaulting in the aforedescribed

payments due and owing to plaintiff from defendants and said defendants have thereby committed an act of default pursuant to provision No. 16(A) of the aforedescribed Franchise Agreement.

46. Pursuant to the aforedescribed provision No. 16(A) of the Franchise Agreement, entitled default and effect of termination, plaintiff has complied with all conditions precedent to said obligation by providing the defendants with written notice of said default and written notice of said termination as aforedescribed and alleged by the communications and letters which are attached hereto as plaintiff's composite Exhibit No. 4.

47. Provision No. 16(B), entitled effect of termination, of the aforedescribed Franchise Agreement, plaintiff's Exhibit No. 2, provides that upon termination of the agreement by the occasion of a default, the franchisees right to use the BURGER KING MARKS and the BURGER KING SYSTEM shall terminate. In addition, the franchisees will not thereafter identify themselves as a BURGER KING franchisee or publicly identify themselves as a former BURGER KING franchisee or use any of the plaintiff's trade secrets, operating procedures, promotional materials, marks or any mark confusingly similar. In addition, upon termination, the franchisees would immediately return to the plaintiff the manuals loaned to them, together with all other material containing trade secrets, restaurant operating instructions, or the business practices of the plaintiff. In addition, the franchisees agreed to immediately remove themselves from the aforedescribed restaurant and return control and possession of the aforedescribed restaurant to the plaintiff.

48. Despite the aforedescribed notices of termination from plaintiff to defendants, as aforedescribed and alleged and as exhibited in plaintiff's composite Exhibit No. 4,

defendants have refused to discontinue their activities as a BURGER KING franchisee in violation of the aforedescribed Franchise Agreement and said defendants continue to use plaintiff's service marks, trademarks, and hold themselves out as operators of a BURGER KING licensed restaurant with a deliberate intent and design to trade upon the plaintiff's trademarks and service marks and the valuable goodwill attached thereto. Further, said defendants have refused to remove themselves from the aforedescribed restaurant and have refused to return control and possession of the aforedescribed restaurant to the plaintiff. In addition, defendants refuse to refrain from their continued use of plaintiff's BURGER KING SYSTEM involving symbols, devices, recipes, formulas, food mixes and other materials, all in violation of the aforedescribed franchise agreement and as a result, plaintiff has suffered and will continue to suffer irreparable injury and/or damage.

49. The continued operation by defendants of said restaurant which they represent to be a BURGER KING licensed restaurant, together with the sale of food products to the public pursuant to plaintiff's registered service marks and trademarks is likely to cause confusion and mistake and to deceive purchasers into believing that they are patronizing a BURGER KING licensed restaurant and buying plaintiff's approved products.

50. Defendants use of plaintiff's service marks and trademarks make it likely that a false and unfair association will be made between the plaintiff's goods and the defendants' goods in that purchasers are likely to believe that food products sold by the defendants are connected with or approved by plaintiff.

51. Defendants aforedescribed acts and conduct tend to reduce and dilute the value of plaintiff's goodwill and said conduct and acts are being committed with the intent

and for the purpose of appropriating and trading upon plaintiff's good will and reputation symbolized by the aforedescribed service marks and trademarks and with the intent and for the purpose of representing that defendants products are the products connected with or approved by the plaintiff.

52. Said defendants continued operation of the aforedescribed restaurant as a BURGER KING restaurant with the unauthorized use of the BURGER KING trademarks and service marks constitute an infringing use of and/or an infringement of those trademarks and service marks in violation of the common law rights and statutory rights of plaintiff, BURGER KING CORPORATION.

53. By reason of defendants aforedescribed conduct and acts, plaintiff has suffered serious injury and/or damages which is irreparable and said injury and/or damages will continue and increase, unless the defendants are enjoined from continuing said acts.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, for damages, including the defendants' profits, the plaintiff's damages, the costs of this action, plus interest, treble damages, and injunctive relief, and demands trial by jury.

DATED this 27 day of May, 1981.

PODHURST, ORSECK, PARKS,
JOSEFSBERG, EATON, MEADOW
& OLIN, P.A.
1201 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Attorneys for Plaintiff
By: /s/ Barry L. Meadow
Barry L. Meadow

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

MOTION FOR SUMMARY JUDGMENT AND/OR DISMISSAL AND/OR CHANGE OF VENUE PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, LACK OF SERVICE OF PROCESS, IMPROPER VENUE AND LACK OF JURISDICTION UNDER FEDERAL RULE 12(b)

Request for Oral Argument

NOW COMES the above named defendant, JOHN RUDZEWICZ, Only, by and through his attorneys, OEHMKE LEGAL ASSOCIATES and hereby moves this Court as follows:

1. To dismiss the above stated cause of action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the above stated action or in lieu thereof to quash the return of service of summons on the grounds:

a. That the defendant JOHN RUDZEWICZ is a named resident of the State of Michigan and was not and is not subject to service of process within the Southern District of Florida, and;

b. That the defendant JOHN RUDZEWICZ, has not been properly served with process in this action, all of which more clearly appears in the affidavit of the defendant, JOHN RUDZEWICZ annexed hereto as Exhibit A.

3. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this court is envoked, in part, on the basis of diversity and "long-arm" statute and;

b. The defendant was not present or domiciled in the State of Florida at the time when the purported service of process was made, and;

c. The claim did not arise within this District as is evident from the face of plaintiffs' Complaint and JOHN RUDZEWICZ's Affidavit, annexed hereto as Exhibit A.

4. To dismiss the action on the grounds that this Federal Court is without jurisdiction because:

a. The jurisdiction of this Court is envoked, in part, on the allegation that this case involves a Federal Question;

b. That venue over this matter is controlled by Title 28, Sec. 1391 which provides, in part, that a Civil Action which is not founded solely on diversity of citizenship can be brought only in the Judicial District where all defendants reside, or in which the claim arose.

5. To dismiss the action on the grounds that the court lacks jurisdiction under Rule 4(e) and (f) of the Federal Rules of Civil Procedure.

This motion is based on the records and files in the entitled cause, and is supported by a brief attached hereto.

Defendant's attorney has requested that plaintiffs' attorney dismiss the above captioned complaint but has been refused.

OEHMKE LEGAL ASSOCIATES
/s/ Thomas H. Oehmke
Thomas H. Oehmke (P22963)

Dated: 22 June 1981

REQUEST FOR ORAL ARGUMENT

NOW COMES Thomas H. Oehmke, Attorney for Defendant JOHN RUDZEWICZ, and makes a request for an opportunity to make an oral argument on his Motion for Summary Judgment and/or Dismissal and/or Change of Venue Presenting Defenses of Failure to State a Claim, Lack of Service of Process, Improper Venue and Lack of Jurisdiction Under Federal Rule 12(b) because of the complicated issues presented, the sweeping and incorrect allegations of fact—wrongly made in the Complaint—which form the basis for Florida jurisdiction, and the serious economic consequences for Defendant, a Michigan resident, to defend himself in a Florida lawsuit.

/s/ Thomas H. Oehmke
Thomas H. Oehmke (P22963)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

ORDER

This matter is before the Court on the motion of Defendants' for Summary Judgment, etc., The motion has been fully briefed by both sides.

The Court has examined the briefs filed in support of the motion and filed in opposition to it and has determined that a non-resident Burger King franchisee is subject to the personal jurisdiction of this Court in actions arising out of its franchise agreements. It has also been held that venue in the Southern District of Florida is proper in such actions. Numerous recent cases in this Court supply

authority for the foregoing propositions. See *Burger King Corporation v. David M. Elliott,* Case No. 80-2694-Civ-EBD; *Burger King Corporation v. Gary L. Wagner,* Case No. 80-942-Civ-EBD; *Burger King Corporation v. Paul D. Snow, Jr., et al.,* 80-295-Civ-SMA; *Burger King Corporation v. Blanchard W. Robinson and Utopia Systems, Inc.,* Case No. 79-5824-Civ-EPS; *Burger King Corporation v. Gerald A. Mason, et al.,* Case No. 78-2932-Civ-EBD.

The Court considers the Defendants' remaining argument to be without merit. Accordingly, it is

ORDERED AND ADJUDGED that the motion for summary judgment, etc., is DENIED. Defendants shall have twenty (20) days from the date hereof in which to file their Answer to the Complaint. It is further

ORDERED AND ADJUDGED that the Court will defer ruling on Plaintiff's motion for preliminary injunction until final hearing. This cause will be accelerated and set for final hearing by separate order after an answer has been received. The parties should anticipate that this cause will be set for final hearing before the end of this year.

DONE AND ORDERED in chambers at Miami, Florida, this 20th day of August, 1981.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

CC: Barry L. Meadow, Esquire
Paul W. Harty, Esquire
Thomas H. Oehmke, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

(Filed September 24, 1981)

ANSWER TO COMPLAINT

NOW COMES one of the Defendants herein, namely JOHN RUDZEWICZ, by and through his attorneys, OEHMKE LEGAL ASSOCIATES, and answers Plaintiff's Complaint as follows:

1. Answering Paragraph 1, this Defendant denies jurisdiction, but admits the controversy exceeds Ten Thousand and no/100 ($10,000.00) Dollars.

2. Answering Paragraph 2, this Defendant denies the jurisdiction grounds.

3. Answering Paragraph 3, this Defendant neither admits nor denies the same and leaves the Plaintiff to its proof thereof.

4. Paragraph 4 is not applicable to this Defendant.

5. Answering Paragraph 5, this Defendant admits he is a citizen and resident of the State of Michigan, but denies he is subject to jurisdiction of this Honorable Court except as ordered by this Court.

6. Answering Paragraph 6, this Defendant denies the same.

7. Answering Paragraph 7, this Defendant admits signing Exhibit "1" in Michigan.

8. Answering Paragraph 8, this Defendant admits signing the Franchise Agreement, but in the State of Michigan.

9. Answering Paragraph 9, this Defendant admits signing the Lease, but the same was signed and executed in the State of Michigan.

10. Answering Paragraph 10, this Defendant admits the same, except it opened and operated under the corporate name of RMBK Corp., a Michigan corporation.

11. Answering Paragraph 11, this Defendant states that the Franchise Agreement speaks for itself, but it was entered into under false representations.

12. Answering Paragraph 12, this Defendant states that the Lease or Sublease Agreement speaks for itself, but it was entered into under false representations.

13. Answering Paragraph 13, this Defendant denies the same and says that all purchases were made to RMBK Corp., a Michigan corporation, and that it is the owner of the restaurant.

14. Answering Paragraph 14, this Defendant denies the same.

15. Answering Paragraph 15, this Defendant denies the same and states the Plaintiff knew that the business was being operated by RMBK Corp., & all moneys paid to Plaintiff were paid by RMBK Corp. on checks with the corporate name imprinted thereon.

16. Answering Paragraph 16, this Defendant admits the restaurant is being operated by RMBK Corp.

17. Answering Paragraph 17, this Defendant admits the restaurant is being operated by RMBK Corp.

18. Answering Paragraph 18, Defendant Rudzewicz adopts and incorporates by reference his answers to Paragraphs 1 through 17.

19. In reply to Paragraph 19, subparagraphs (a) through (f), Defendant Rudzewicz denies the same..

20. Answering Paragraph 20, this Defendant denies the same.

21. Answering Paragraph 21, this Defendant denies the same.

22. Answering Paragraph 22, this Defendant denies the same.

23. Answering Paragraph 23, this Defendant denies the same.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

COUNT II

24. Answering Paragraph 24, Defendant Rudzewicz adopts and incorporates by reference his answers to Count I, Paragraphs 1 through 23.

25. Answering Paragraph 25, this Defendant denies these conclusions.

26. Answering Paragraph 26, this Defendant denies these conclusions.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

COUNT III

27. Answering Paragraph 27, Defendant Rudzewicz adopts and incorporates by reference his answers to Counts I and II, specifically Paragraphs 1 through 26.

28. Answering Paragraph 28, this Defendant denies the same.

29. Answering Paragraph 29, this Defendant denies the same.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

30. Answering Paragraph 30, Defendant Rudzewicz adopts and incorporates by reference his answers to Counts I, II and III, specifically Paragraphs 1 through 29.

31. Answering Paragraph 31, this Defendant denies the same.

32. Answering Paragraph 32, this Defendant denies that they have not objected.

33. Answering Paragraph 33, this Defendant denies the same.

34. Answering Paragraph 34, this Defendant denies the same.

WHEREFORE, this Defendant demands that Plaintiff's Complaint be dismissed with costs most wrongfully sustained.

COUNT V

35. Answering Paragraph 35, Defendant Rudzewicz adopts and incorporates by reference his answers to Counts I, II, III and IV, specifically Paragraphs 1 through 34.

36. Answering Paragraph 36, this Defendant admits the same.

37. Answering Paragraph 37, this Defendant neither admits nor denies the same, but leaves Plaintiff to its proof thereof.

38. Answering Paragraph 38, this Defendant denies the same for all sales are being made to RMBK Corp. and

are being made and paid for by RMBK Corp. on a cash basis for a long period of time.

39. In reply to Paragraph 39, this Defendant does not know what the Plaintiff has done for others, but has done very little, if anything for this Defendant.

40. Answering Paragraph 40, all sales of Plaintiff's exclusive products have been made to RMBK Corp. only and for a long period of time on a cash basis.

41. Answering Paragraph 41, this Defendant neither admits nor denies the same and leaves the Plaintiff to its proof thereof.

42. Answering Paragraph 42, this Defendant is not operating Restaurant 775, but RMBK Corp. as all records of the State of Michigan and the Internal Revenue Service will show.

43. Answering Paragraph 43, this Defendant states that the Exhibit speaks for itself, but the real party in interest is RMBK Corp. who has acquired certain rights since taking over the operation of the Burger King Restaurant located in Drayton Plains, Michigan.

44. Answering Paragraph 44, this Defendant states that the Plaintiff knew that the Defendants were turning the operation of the restaurant to a Michigan corporation known as RMBK Corp. before opening and Plaintiff knows that the corporation has been operating the restaurant for all checks, all payments were made by RMBK and RMBK Corp. is still buying food on a cash basis from a division of Plaintiff.

45. Answering Paragraph 45, this Defendant denies the same.

46. Answering Paragraph 46, this Defendant denies the same and states that no notice of any kind has been given to RMBK Corp.

47. Answering Paragraph 47, this Defendant states that it is the Plaintiff's obligation to prove the legal rights of the Plaintiff and further answering said paragraph, this defendant states that the restaurant is being operated by an employee of RMBK Corp.

48. Answering Paragraph 48, this Defendant states that the Plaintiff still continues to sell its food and supplies to RMBK Corp.

49. Answering Paragraph 49, this Defendant denies the same for all products being sold are purchased for Plaintiff.

50. Answering Paragraph 50, this Defendant denies the same and states that all food sold by RMBK Corp. is approved by the Plaintiff and sold by it to RMBK Corp.

51. Answering Paragraph 51, this Defendant denies the same.

52. Answering Paragraph 52, this Defendant denies the same and states that the restaurant is being operated by RMBK Corp.

53. Answering Paragraph 53, this Defendant denies the same.

WHEREFORE, this Defendant prays that this Complaint be dismissed with costs so wrongfully sustained.

OEHMKE LEGAL ASSOCIATES
By: /s/ Thomas H. Oehmke
THOMAS H. OEHMKE,
Attorney

Dated: September 15, 1981

AFFIRMATIVE DEFENSE

NOW COMES one of the defendants herein, namely JOHN RUDZEWICZ, by and through his attorneys, OEHMKE LEGAL ASSOCIATES, and by way of affirmative defenses states:

1. That Defendant RUDZEWICZ, preserves the right to add to its answer and to rely upon all affirmative defenses as may be hereafter disclosed by way of discovery.

OEHMKE LEGAL ASSOCIATES
By: /s/ Thomas H. Oehmke
THOMAS H. OEHMKE,
Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

DEFENDANT RUDZEWICZ'S COUNTERCLAIM

NOW COMES John J. Rudzewicz, by counsel, and in support of its Counterclaim (under FRCP 13(a) and 13(f)), says:

JURISDICTION

1. That John J. Rudzewicz is an individual and resident of the County of Oakland, State of Michigan and that all transactions this Counterclaim and Cross-Claim arise out of the transaction or occurrence that is the subject matter of the original complaint filed herein.

2. That Burger King Corporation (called "BKC" hereinafter) is a Florida Corporation doing business in the County of Oakland, State of Michigan, where Store #775,

the subject of the Complaint herein, is located and does business.

3. That the Counterclaim against BKC is a compulsory counterclaim (brought under FRCP 13(a) which may have been an omitted counterclaim (under FRCP 13(f)).

FRANCHISE AGREEMENTS

4. That BKC made an offer or sale of a franchise (as defined in MCL 445.1502(3) and called "franchise" hereinafter) to Defendants Rudzewicz and Brian MacShara in the State of Michigan. (See MCL 445.1404(2).)

5. That franchisees Rudzewicz, Brian MacShara, and RMBK Corp. (called "franchisees" hereinafter) are domiciled in the State of Michigan and the franchise for Store #775 was to be, is, and has always been, operated in the State of Michigan. (See MCL 445.1404(2).)

6. That the offer to sell the franchise by BKC to the franchisees originated in the State of Michigan and received by franchisees in the State of Michigan. (See MCL 445.1404(3).)

7. That the offer to sell by BKC was directed by BKC to franchisees in the State of Michigan and received by franchisees in the State of Michigan. (See MCL 445.1404(3).)

8. That the offer to sell the franchise was accepted in the State of Michigan by franchisees and acceptance of such offer was communicated to BKC in the State of Michigan. (See MCL 445.1404(3).)

9. That the acceptance by the franchisees was communicated to BKC in the State of Michigan (as it was directed to the BKC Southfield, Michigan office in the State of Michigan) where franchisees reasonably believed

BKC to be located and such acceptance was received by BKC in Drayton Plains, Michigan.

10. That the franchise which is the subject of this Complaint is subject to the Michigan Franchise Investment Law, being MCL 445.1501 *et seq.*

PROHIBITED ACTS

11. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC employed a device, scheme, or artifice to defraud Franchisees by systematically conducting a series of interviews with BKC personnel at its Southfield, Michigan office who, individually and collectively, deluged franchisees with oral and written information designed to induce franchisees to execute the franchise agreements, even though it was a financially inadvisable venture, upon which franchisees relied to their detriment and which induced them to enter into the franchise agreement(s), all contrary to MCL 445.1505(1)(a).

12. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC made one or more untrue statements of a material fact, which franchisees relied upon to their detriment and which induced them to enter into the franchise aggreement(s), all contrary to MCL 445.1505(1)(b).

13. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC omitted to state one or more material facts necessary in order to make the statement(s) made not misleading, (in light of all the circumstances under which they are made), upon which franchisees relied to their detriment and which induced them to enter into the franchise agreement(s), all contrary to MCL 445.1505(1)(b).

14. That in connection with the offer, sale, or purchase of the franchise, directly or indirectly, BKC engaged in an act, practice, or course of business which operated as a fraud or deceit upon franchisees, and upon which franchisees relied to their detriment and which induced them to enter into the franchisee agreement(s), all contrary to MCL 445.1505(c).

15. That the franchise agreement(s) into which franchisees entered were subject to registration under the Michigan Franchise Investment Law, being MCL 445.1501 et seq.

16. That such franchise agreement(s) were sold by BKC to franchisees without first providing to such prospective franchisees a copy of of the prospectus, together with a copy of all proposed agreements relating to the sale of the franchise, at least one week prior to the execution by the prospective franchisees the binding franchise agreement or other agreement(s), all contrary to MCL 445.1516.

17. That such franchise agreement(s) were sold by BKC to franchisees without first providing to such prospective franchisees a copy of the prospectus, together with a copy of all proposed agreements relating to the sale of the franchise, at least one week prior to the receipt of any consideration from franchisees, all contrary to MCL 445.1516.

18. That the franchise offered to franchisees in the State of Michigan was not registered as required by the Michigan Franchise Investment Law, contrary to MCL 445.1506(1).

RELIEF

19. That the Michigan Franchise Investment Law provides that a person who offers or sells a franchise in

violation of sections 5(1), 6 or 16 is liable to the person purchasing the franchise for damages or recission, with interest at 6% per year from the date of purchase and reasonable attorney fees and court costs. (See MCL 445.1531(1).)

20. That in a proceeding under the Michigan Franchise Investment Law, damages may be based on reasonable approximations, but not on speculation. (See MCL 445.1531(3).)

WHEREFORE, Counterclaimant John J. Rudzewicz prays that with respect to BKC only, this Honorable Court will:

(A) Rescind the agreement(s) with BKC, and

(B) Award damages (including refund of the franchise fee) based on reasonable approximations, with interest at 6% per year from the date of purchase, and

(C) Award reasonable attorney fees, and

(D) Award Court costs.

OEHMKE LEGAL ASSOCIATES
/s/ By Thomas H. Oehmke
Thomas H. Oehmke
Attorney for Defendant John J. Rudzewicz *only*

Dated: 30 November 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title omitted in printing)

COUNTERDEFENDANT, BURGER KING CORPORATION'S ANSWER TO COUNTERPLAINTIFF, RUDZEWICZ'S COUNTERCLAIM

PLAINTIFF/COUNTERDEFENDANT, BURGER KING CORPORATION, herein files this Answer to the Counterclaim filed on behalf of Defendant/CounterPlaintiff, JOHN RUDZEWICZ, as follows:

1. CounterDefendant admits the allegation of Paragraph 2.

2. CounterDefendant denies the allegations of Paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20.

WHEREFORE, CounterDefendant requests that the Counterclaim filed herein be dismissed.

(Jurat omitted in printing)

PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Attorneys for Plaintiff
1201 City National Bank Bldg.
Miami, FL 33131
358-2800
By: /s/ Barry L. Meadow
Barry L. Meadow

(Filed March 3, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

vs.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER THEREON

THIS CAUSE came on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, pursuant to Defendant, BRIAN MacSHARA's Waiver of Jury Demand dated January 29, 1982, pursuant to Defendant JOHN RUDZEWICZ's, Waiver of Jury Demand dated January 20, 1982, and pursuant to Plaintiff, BURGER KING CORPORATION's, Waiver of Jury Demand pursuant to Rule 39(a) of the Federal Rules of Civil Procedure announced on the record at the trial of this cause which commenced on February 2, 1982. Pursuant to Rule 52 of the Federal Rules of Civil Procedure, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

This Court makes the following findings of fact:

1. That Plaintiff, BURGER KING CORPORATION, is a Florida corporation with its principal place of business located in Miami, Dade County, Florida.

2. That Defendant, JOHN RUDZEWICZ, is a citizen and resident of the State of Michigan.

3. That Defendant, BRIAN MacSHARA, is a citizen and resident of the State of Michigan.

4. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

5. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Burger King Restaurant Franchise Agreement with the Plaintiff, BURGER KING CORPORATION.

6. That on June 4, 1979, Defendant, JOHN RUDZEWICZ, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

7. That on June 4, 1979, Defendant, BRIAN MacSHARA, signed and entered into a Lease or Sub-Lease Agreement with the Plaintiff, BURGER KING CORPORATION.

8. That the above-described Franchise Agreement and Lease or Sub-Lease Agreement pertain to Burger King Restaurant Number 775 located at 4983 Dixie Highway, Drayton Plains, Michigan.

9. That Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, signed and entered into the above-described Franchise Agreement and Lease or Sub-Lease Agreement in their individual capacities.

10. That pursuant to Paragraph 8A of the above-described Franchise Agreement, franchise royalties were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

11. That pursuant to Paragraph 13 of the above-described Franchise Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

12. That pursuant to Section 3.1 of the above-described Lease or Sub-Lease Agreement, rental payments were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

13. That pursuant to Section 6.1 of the above-described Lease or Sub-Lease Agreement, all taxes were to be reimbursed by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said reimbursements to BURGER KING CORPORATION in Miami, Dade County, Florida.

14. That there was an agreement between the parties that all payments by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, for all supplies and other materials ordered by said Defendants from Plaintiff's DAVMOR DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to BURGER KING CORPORATION by mailing said payments to BURGER KING CORPORATION in Miami, Dade County, Florida.

15. That there was an agreement between the parties that all supplies and other materials ordered by said Defendants from Plaintiff's DISTRON DIVISION, were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

16. That pursuant to Paragraph 8B of the above-described Franchise Agreement, advertising fees were to be paid by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, to Plaintiff, BURGER KING CORPORATION.

17. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Forty-Four Thousand, Five Hundred Sixty-Seven Dollars and Seventy-Three Cents ($44,567.73), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8A of the Franchise Agreement for franchise royalties.

18. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to Plaintiff, BURGER KING CORPORATION, the sum of Thirty-Four Thousand, Five Hundred One Dollars and Thirty-Six Cents ($34,501.36), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 8B of the Franchise Agreement for advertising.

19. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ, and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of One Hundred-Eleven Thousand, Seven Hundred-Ten Dollars and Sixty Cents ($111,710.60), which is due and owing to BURGER KING CORPORATION pursuant to Section 3.1 of the Lease or Sub-Lease Agreement for rent.

20. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to reimburse BURGER KING CORPORATION the sum of Eleven Thousand, Seventy-Six Dollars and Forty-Four Cents ($11,076.44), which is due and owing to BURGER KING CORPORATION pursuant to Paragraph 13 of the

Franchise Agreement and pursuant to Section 6.1 of the Lease or Sub-Lease Agreement for taxes.

21. That as of January 15, 1982, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Six Thousand, Twenty-Six Dollars and Eighty Cents ($6,026.80), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DAVMOR DIVISION.

22. That as of January 15, 1982, the Defendants JOHN RUDZEWICZ and BRIAN MacSHARA, have failed to pay to BURGER KING CORPORATION the sum of Twenty Thousand, Nine Hundred Ninety-Two Dollars and Forty-Seven Cents ($20,992.47), which is due and owing to BURGER KING CORPORATION for supplies and other materials ordered by said Defendants from BURGER KING CORPORATION's DISTRON DIVISION.

23. That as of January 15, 1982, Deefndants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe to Plaintiff, BURGER KING CORPORATION, the total sum of Two Hundred Twenty-Eight Thousand, Eight Hundred Seventy-Five Dollars and Forty Cents ($228,875.40).

24. That Plaintiff, BURGER KING CORPORATION, mailed to the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, and the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, received the appropriate Notice of Default letters, Default letters, and Termination of Franchise letters pursuant to the provisions of Paragraph 16 of the above-described Franchise Agreement and pursuant to the provisions of Section 8.1 of the above-described Lease or Sub-Lease Agreement.

25. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, make any material statements of fact to the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, which were false.

26. That prior to the execution by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the above-described Franchise Agreement and Lease or Sub-Lease Agreement on June 4, 1979, neither did the Plaintiff, BURGER KING CORPORATION, nor did any of the Plaintiff's agents, servants, or employees, represent or give the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, false figures pertaining to the past gross-sales history of Burger King Restaurant Number 775 or false figures pertaining to the projected or estimated future gross-sales of Burger King Restaurant Number 775.

27. That any statements of fact made by Plaintiff, BURGER KING CORPORATION, and its agents, servants or employees, to Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, pertaining to gross-sales figures for Burger King Restaurant Number 775, either in the past or to be expected in the future, were joined and merged into the above-described Franchise Agreement and said Franchise Agreement, pursuant to Paragraph G, Introduction, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

28. That at all times during the transactions between the Defendants, JOHN RUDEZWICZ and/or BRIAN MacSHARA, and the Plaintiff, BURGER KING CORPORA-

TION, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, were and are experienced and sophisticated businessmen and at no time were the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, acting under economic duress or disadvantage imposed by the Plaintiff, BURGER KING CORPORATION.

29. That the cause of the low gross-sales volume of Burger King Restaurant Number 775 located in Drayton Plains, Michigan, was and is due to additional competition and the prevailing economic conditions in the surrounding area of said restaurant.

30. That Paragraph 14 of the Franchise Agreement and Section 12.2 of the Lease or Sub-Lease Agreement prohibited assignment of the Franchise Agreement and/or the Lease or Sub-Lease Agreement without the written consent and approval of Plaintiff, BURGER KING CORPORATION.

31. That the Defendants, JOHN RUDZEWICZ and/or BRIAN MacSHARA, never requested and the Plaintiff, BURGER KING CORPORATION, never consented, in writing, to the assignment and/or the purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation.

32. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, had in their possession copies of the Burger King Corporation Uniform Franchise Offering Circular approximately four and one-half months prior to their execution of the above-described Franchise Agreement and Lease or Sub-Lease Agreement and that said circular contained copies of the Franchise Agreement and Lease or Sub-Lease Agreement.

33. That Plaintiff, BURGER KING CORPORATION, did not violate the laws of the State of Michigan pertaining to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, assuming, without deciding, that BURGER KING CORPORATION is subject to those laws.

34. That, at the present time, neither Defendant, JOHN RUDZEWICZ or BRIAN MacSHARA, is managing or operating Burger King Restaurant Number 775 on a full-time, day to day basis, in violation of Paragraph 3 of the Franchise Agreement.

35. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, having continued to use the BURGER KING CORPORATION trademarks, tradenames, service marks, methods, and logos, in violation of the above-described Franchise Agreement after proper termination of said Franchise Agreement by Plaintiff, BURGER KING CORPORATION.

36. That it is in the best interests of the consuming public that, at the Plaintiff, BURGER KING CORPORATION's election, either the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, immediately close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to Plaintiff, BURGER KING CORPORATION, for their continued operation of said Burger King Restaurant Number 775.

CONCLUSIONS OF LAW

This Court concludes, as a matter of law, the following:

A. That this Court has jurisdiction over the subject matter and the parties to this cause.

B. That said Franchise Agreement and Lease or Sub-Lease Agreement executed by Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, on June 4, 1979, have been properly terminated by Plaintiff, BURGER KING CORPORATION.

C. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for breach of the Franchise Agreement and Lease or Sub-Lease Agreement, and Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, have breached the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979.

D. That as a direct and proximate result of the breach of the Franchise Agreement and Lease or Sub-Lease Agreement executed on June 4, 1979, by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

E. That Plaintiff, BURGER KING CORPORATION, has proven the necessary elements of an action for an Open Account.

F. That as a result of the action proven for an Open Account, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, owe Plaintiff, BURGER KING CORPORATION, the sum of TWO HUNDRED TWENTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY-FIVE DOLLARS AND FORTY CENTS ($228,875.40), as of January 15, 1982.

G. That Plaintiff, BURGER KING CORPORATION, has failed to prove the necessary elements of an action for an Account Stated.

H. That said Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are jointly and severally liable to Plaintiff, BURGER KING CORPORATION, for the above-stated amounts found due and owing to Plaintiff, BURGER KING CORPORATION, in their individual capacities.

I. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove any of the required elements of an action for fraud, misrepresentation, or deceit.

J. That the Franchise Agreement and Lease or Sub-Lease Agreement executed by and between the parties on June 4, 1979, was the entire agreement between the parties and superseded all prior negotiations, commitments, representations and undertakings between the parties.

K. That any assignment and/or purported assignment by the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, of the Franchise Agreement and the Lease or Sub-Lease Agreement to RMBK Corporation is void as it may pertain to this transaction between the parties and as it may pertain to any amounts found herein to be due and owing to Plaintiff, BURGER KING CORPORATION, from the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA.

L. That the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, in support of their affirmative defenses and in support of their Counter-Claim against Counter-Defendant, BURGER KING CORPORATION, have failed to prove that BURGER KING CORPORATION violated the laws of the State of Michigan pertaining to the Michigan Franchise Investment Law or any other laws of the State of Michigan brought to the attention of this Court pertaining to the sale or purchase of a franchise, as-

suming, without deciding, that BURGER KING CORPORATION is subject to those laws.

M. That the Defendants, JOHN RUDZEWICZ's and BRIAN MacSHARA's, unauthorized continued use of the BURGER KING CORPORATION trademarks, tradenames, service marks, methods and logos, after proper termination of the Franchise Agreement by the Plaintiff, BURGER KING CORPORATION, constitutes an infringing use of and/or infringement of those properties in violation of the common law rights and statutory rights of the Plaintiff, BURGER KING CORPORATION.

N. That irreparable harm may result to the Plaintiff, BURGER KING CORPORATION, if the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, continue to infringe upon BURGER KING CORPORATION's above-described property rights and at Plaintiff, BURGER KING CORPORATION's, election, the Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, shall either close Burger King Restaurant Number 775 from continued operation or immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED, as follows:

1. Plaintiff shall submit a Final Judgment, in conformity with these Findings of Fact and Conclusions of Law, within three (3) days of the date of entry of this Order.

2. This Court further reserves jurisdiction of this cause with reference to determining and/or assessing attorneys fees and costs, upon appropriate motion.

3. Defendants, JOHN RUDZEWICZ and BRIAN MacSHARA, are, at the election of Plaintiff, BURGER KING CORPORATION, hereby ordered to immediately close Burger King Restaurant Number 775 from continued operation or to immediately give the keys and possession of said restaurant to BURGER KING CORPORATION for their continued operation of said Burger King Restaurant Number 775.

4. This Court further reserves jurisdiction of this cause with reference to the enforcement of, and/or the compliance with, the provisions of Paragraph 3 above.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 3 day of March, 1982.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

Copies furnished to:

BARRY L. MEADOW, ESQ.
PAUL H. HARTY, ESQ.
THOMAS H. OEMHKE, ESQ.
RICARDO CATA, ESQ.

(Filed March 5, 1982)

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO: 81-1145-Civ-JWK

BURGER KING CORPORATION, etc.,
Plaintiff,

v.

BRIAN MacSHARA and JOHN RUDZEWICZ,
Defendants.

FINAL JUDGMENT

THIS CAUSE having come on for trial before this Court sitting without a jury on February 2, 3 and 4, 1982, and this Court having entered its Findings of Fact and Conclusions of Law and Order thereon, dated March 3, 1982, and being otherwise fully advised in the premises, it is accordingly

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered in favor of Plaintiff, BURGER KING CORPORATION and against the Defendants, BRIAN MacSHARA and JOHN RUDZEWICZ, jointly and severally, in the amount of TWO HUNDRED TWENTY-EIGHT THOUSAND EIGHT HUNDRED SEVENTY FIVE DOLLARS AND FORTY CENTS ($228,875.40) for all of which sum let execution issue. Attorneys fees and costs shall be hereinafter taxed.

ORDERED AND ADJUDGED that Final Judgment be and the same is hereby entered on the Counterclaims filed herein by Defendants/Counterclaimants, in favor of Counterdefendant, BURGER KING CORPORATION, and against Counterclaimants, BRIAN MacSHARA and JOHN

RUDZEWICZ, who shall take nothing by said Counterclaims.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida on this 5th day of March, 1982.

/s/ James W. Kehoe
U.S. DISTRICT COURT
JUDGE

cc: Barry L. Meadow, Esquire
Ricardo Cata, Esquire
Paul Harty, Esquire
Thomas H. Oehmke, Esquire

BURGER KING CORPORATION, a Florida Corporation,
Plaintiff-Appellee,

v.

Brian MacSHARA, Defendant,
John Rudzewicz, Defendant-Appellant.

No. 82-5424.

United States Court of Appeals,
Eleventh Circuit.

Feb. 13, 1984.

Franchisee appealed from judgment of the United States District Court for the Southern District of Florida, James W. Kehoe, J., awarding franchisor damages of $228,875.40 as well as costs of $2,151.06 and attorney fees of $30,000, in franchisor's breach of contract and trademark infringement action. The Court of Appeals, Vance, Circuit Judge, held that even though franchisee's activities fell within reach of Florida's long-arm statute, invocation of statute offended fundmental fairness which was touchstone of due process.

Reversed and remanded.

Johnson, Circuit Judge, filed dissenting opinion.

1. Constitutional Law (Key) 305(4)
Federal Courts (Key) 373

In diversity case, federal district court must exercise its jurisdiction in accordance with due process and law of state in which court sits. U.S.C.A. Const.Amend. 5.

2. Courts (Key) 12(2)

No defendant can be compelled to answer in state's courts unless minimum contacts exist between defendant,

forum state and litigation such that maintenance of suit does not offend traditional notion of fair play and substantial justice.

3. Constitutional Law (Key) 305(5)

In deference to sovereignty of forum's sister states, due process requires that there be some act by which defendant purposely avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws. U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law (Key) 305(4)

Due process restrictions on jurisdiction of courts are more than guaranty of immunity from inconvenient or distant litigation; they are consequence of territorial limitations on power of respective states. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law (Key) 305(5)

State cannot justifiably assert jurisdiction over individual with whom it has no constitutionally cognizable contacts or ties.

6. Constitutional Law (Key) 305(5)

Although franchisee's activities fell within reach of Florida long-arm statute, invocation of statute offended fundamental fairness which is touchstone of due process, where only face-to-face contacts franchisee had with franchisor throughout months of protracted negotiations were with representatives of franchisor's Michigan office, franchisee maintained no staff in state of Florida, contracts contemplated start of Michigan restaurant whose profits would derive solely from food sales made to customers

in Michigan, local Michigan office was responsible for providing all the services due franchisee, and franchisee was financially unprepared to meet costs of suit in Florida. West's F.S.A. § 48.193(1)(g); U.S.C.A. Const.Amends. 5, 14.

Thomas H. Oehmke, Oehmke & Richardson, Detroit, Mich., for defendant-appellant.

Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Joel S. Perwin, Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

VANCE, Circuit Judge:

In 1979, with the economy poised on the brink of recession, John Rudzewicz and Brian MacShara decided to purchase a Burger King restaurant franchise near Detroit, Michigan. This appeal, filed by Rudzewicz,[1] is the unforeseen outcome of their ill-timed venture.

Rudzewicz, a senior partner in a Michigan accounting firm, agreed to secure investment capital while MacShara was to handle day-to-day operations. MacShara's experience included stints as a supervisor in his father's Michigan construction firm and as a onetime assistant at a Burger King restaurant. Both were and are residents and citizens of the state of Michigan.

The Burger King Corporation is incorporated in Florida and headquartered in Miami. The company maintains a

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

1. MacShara has not appealed his judgment.

district office in Birmingham, Michigan. During the course of negotiations, which lasted five months, the Michigan district office was Burger King's sole representative in dealings with Rudzewicz and MacShara. H.G. Hoffman, the Michigan district manager, evaluated their proposal and wrote them on the company's behalf to convey approval of their franchise application. Following lengthy discussions, Hoffman persuaded them to acquire an existing store in Drayton Plains, Michigan to avoid the higher rent that would be entailed if they insisted upon construction of a new building. He also convinced them to purchase and install $165,000 worth of equipment before the final rental charge had been computed.

At the conclusion of each round of Michigan negotiations, the Miami office mailed Rudzewicz printed documents for his signature. The documents, once signed, were returned to Burger King headquarters in Miami for completion.[2] Following corporate approval, headquarters then mailed Rudzewicz copies of the completed documents for his files.

After granting initial approval, Burger King decided to schedule the grand opening for May 31, 1979, the close of its fiscal year, to ensure that the sale appeared in the company's year-end statement. On May 29, the day the final agreements arrived for signature, Rudzewicz and MacShara finally learned what rent Burger King expected them to pay. The figure was far in excess of the amount Rudzewicz had projected.[3] He telephoned Hoffman and demanded a lower figure. According to Rudzewicz, Hoffman replied that the rent computation was out of his

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2. The record does not identify who mailed the papers to Miami.

3. *See infra* note 4.

hands. If Rudzewicz was unwilling to accept the figure Burger King proposed, Hoffman continued, he was always free to decline the franchise, rip out the fixtures he had installed at his own expense, and resell them at a loss. On June 4 Rudzewicz and MacShara signed the lease and franchise agreements in their individual capacities at a Michigan closing ceremony attended by employees of the local district office.

In the lease agreement, Burger King agreed to lease the Drayton Plains store for a term of twenty years. Rent was set at a monthly minimum of $4,166.66 in the first two years and $5,286.58 thereafter or 8½% of monthly gross sales, whichever was greater.[4] The franchisees were required to remit rent, as well as royalties, tax refunds and other designated fees to Burger King headquarters in Miami.[5]

In return Burger King promised use of the Burger King mark, architectural advice, advertising services, financial counseling, and operations consultation. At trial, an executive from the Miami headquarters office testified that the Michigan district office was administratively responsible for all of the supervision, advertising and consul-

4. The lease called for minimum annual rent consisting of 13.4% of "construction costs." At trial, Rudzewicz testified that Michigan Burger King officials estimated construction costs would equal approximately $180,000. This figure was based on the costs of renovating the existing Drayton Plains facility.

Rent calculated on a base of $180,000 would equal $2,010 a month. Rudzewicz boosted his projection to $2,500 to amortize the additional cost of original construction. Although he testified that Hoffman promised that the rent at Drayton Plains would be lower than that at a new facility, the rent that Burger King finally proposed was computed on a base equal to that estimated for newly constructed facilities. This testimony stands undisputed and uncontradicted.

5. Rudzewicz and MacShara signed equipment contracts containing similar provisions with the Davmore division of Burger King.

tation due under the contract. With the exception of a Burger King University management course which MacShara attended in Florida and the Miami payment obligation, the contracts provided for no contact of any kind between the Florida headquarters and the franchisees.

Within weeks of opening, the store had fallen behind in payments. Rescheduling negotiations broke down, and Burger King sued Rudzewicz and MacShara in diversity in the Southern District of Florida for breach of contract and trademark infringement. Defendants entered a special appearance to contest personal jurisdiction. After losing this motion, they filed a counterclaim seeking damages under the Michigan Franchise Investment Act.[6] A bench trial ensued and Judge Kehoe entered judgment for Burger King on both the contract claim and the counterclaim. Damages of $228,875.40 were assessed against defendants in their individual capacities. In addition, Burger King was awarded costs of $2,151.06 and $30,000 in attorneys fees.

On appeal, Rudzewicz contests his judgment for lack of personal jurisdiction as well as on substantive grounds. He further appeals the ruling on the counterclaim. Because we conclude that the trial court lacked personal jurisdiction over Rudzewicz, we do not reach the merits.

I.

[1] In a diversity case, a federal district court must exercise its jurisdiction in accordance with due process and the law of the state in which the court sits. *Bankhead Enterprises, Inc. v. Norfolk & Western Ry.*, 642 F.2d 802, 804 (5th Cir. Unit B 1981). Although Rudzewicz concedes that his activities fall within the reach of the Florida

6. Mich.Comp.Laws Ann. § 445.1501 *et seq.*

long-arm statute, Fla.Stat. § 48.193(1)(g),[7] he argues that invocation of that statute under these circumstances exceeds the bounds of due process.

[2, 3] No defendant can be compelled to answer in a state's courts unless minimum contacts exist among defendant, the forum state and the litigation such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 203, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). In deference to the sovereignty of the forum's sister states, due process requires "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94, 297, 100 S.Ct. 559, 565-66, 567, 62 L.Ed.2d 490 (1980); *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 159-60.

This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami. This is a subtle and difficult problem. As Mr. Justice White has

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7. That section reads:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

. . .

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

noted, "the question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff," a question which applies *a fortiori* to individual defendants, "has deeply divided the federal and state courts." *Lakeside Bridge & Steel Co. v. Mountain State Construuction Co.*, 445 U.S. 907, 909, 100 S.Ct. 1087, 1089, 63 L.Ed.2d 325 (1980) (White, Jr., joined by Powell, J., dissenting from denial of certiorari); *see also Baxter v. Mouzavires*, 455 U.S. 1006, 102 S.Ct. 1643, 71 L.Ed.2d 875 (1982) (White, J., joined by Powell, J., dissenting from denial of certiorari); *Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994, 102 S.Ct. 1623, 71 L.Ed.2d 856 (1982) (White, J., joined by Burger, C.J. and Powell, J., dissenting from denial of certiorari). *Cf. Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596, 601-02 & n. 9 (7th Cir. 1979). Mindful of this confusion and the continuing uncertainty as to the meaning of *Hanson v. Denckla* and its progeny, we focus our analysis on the guidelines set forth in Supreme Court precedent and the case law of this circuit.

II.

[4, 5] Due process restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. at 251, 78 S.Ct. at 1238. Hence, the minimum contacts measure is not a question of "a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to" the laws of the forum state. *International Shoe*, 326 U.S. at 319, 66 S.Ct. at 160. A state cannot justifiably assert jurisdiction over an individual with whom it has

no constitutionally cognizable contacts or ties. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. at 565-66.

The *Hanson* requirement of purposeful activity within the forum state reflects two contrasting considerations. Particularly in the commercial context, fairness dictates that a defendant who derives profits from deliberate contacts within the forum state should be responsible for the costs such activities incur. On the other hand, due process abhors the unfair surprise that results when a party is haled into court in a state with which he lacks deliberate connections. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567; *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 496 (5th Cir.1974).

The interplay of these considerations—responsibility and preparedness—can plainly be seen in the leading Supreme Court cases of *Shaffer v. Heitner*, *World-Wide Volkswagen*, and *McGee v. International Life Insurance Co.* In *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), plaintiff predicated Delaware jurisdiction in part on the fact that defendants had accepted directorships in Greyhound, Inc., a corporation chartered in Delaware but headquartered in Arizona. Reasoning that directorial appointment in and of itself did not notify defendants that they risked being sued in the state of formal incorporation, the Court concluded that they had not purposefully availed themselves of the opportunity to conduct activities in the state of Delaware so as to confer jurisdiction there. 433 U.S. at 216, 97 S.Ct. at 2586. Three years later, the Court further restricted the scope of personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Court denied jurisdiction over a suit arising from an automobile accident in the forum state of Oklahoma, reasoning that the local New Jersey car dealer

who sold plaintiff the car could not have expected that the sale might give rise to products liability litigation halfway across the country. 444 U.S. at 297-98, 100 S.Ct. at 567-68.

McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), reached the opposite outcome on the basis of slender contacts which nevertheless left the defendant prepared for the possibility of out-of-state litigation. In that case, the Texas successor to a defunct life insurance company wrote Franklin, a California resident, offering to reinsure the policy he held from its predecessor. Franklin accepted the offer and commenced mailing premiums from California to Texas. After Franklin died, the insurer refused to honor the policy. Franklin's beneficiary sued in California state court. Despite the scant contacts between the company and the forum state, the Court concluded that jurisdiction was properly asserted.[8] The defending insurer had derived profit from the California market by soliciting revenue from one of its residents. *Hanson*, 357 U.S. at 251-52, 78 S.Ct. at 1238-39. By virtue of its direct mail offer, furthermore, the insurer had reason to know that its business dealings brought it into contact with the

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8. In reaching its conclusion, the Court noted that California had an interest in affording redress to California residents when out-of-state insurers refused to honor their claims. The Court accorded that interest substantial weight because the prohibitive costs of distant litigation otherwise would force many claimants to forego worthwhile claims. 355 U.S. at 223, 78 S.Ct. at 201. Where a party claiming breach of contract can afford to sue outside of the forum state, as here, the state interest in redress is correspondingly weak. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 n. 27 (5th Cir.1974). *Cf. Lakeside Bridge & Steel Co.*, 597 F.2d at 602 n. 11 ("The forum state has a lesser interest in protecting a corporation in an interstate contract dispute, especially when the corporation left the state to solicit and secure the contract, because the effects of a commercial contract are unlikely to involve danger to persons or things within the state's border.")

forum state and it could adjust its premiums accordingly to reflect the added financial risk of litigation. *See World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

In contrast with their typical case in reconciling jurisdiction over non-resident sellers, courts have encountered particular difficulties in applying *Hanson's* requirement of purposeful activity to suits against non-resident buyers. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 232-33 (6th Cir.1972). In part this reflects a judgment that the activity of incurring a debt with an in-state seller, however purposeful, is not an activity which occurs in the seller's state. *See Lakeside Bridge & Steel Co.*, 597 F.2d at 601-04. The geographical location of activities such as debt incurrence cannot provide a workable basis for determining whether jurisdiction is fair in any given circumstance. A rule which would require determining the geographical origin of a given debt would in our mind unwisely revive the effort to pinpoint the situs of intangibles which in rem jurisdiction entailed. The often metaphysical character of this inquiry in the context of in rem jurisdiction justifiably led the Supreme Court to abandon it in favor of the functional test of fairness enunciated in *International Shoe*. *See Shaffer v. Heitner*, 433 U.S. at 212, 97 S.Ct. at 2584.

We recognize, of course, that there are many circumstances in which a buyer fairly can be held to account in a foreign jurisdiction for the debts he has incurred. While the stereotypical image of buyers as the passive recipients of sellers' attentions assumes that buyers lack notice of the seller's residence and financial resources to defend suit there, *In-Flight Devices Corp.*, 466 F.2d at 233; Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U.Ill.L.F. 574, 576, this assumption is not always true. Some buyers can

demand terms; others must accede to them. Thoughts of profit motivate some orders; more personal desires impel others. Purchases may involve large amounts or small, a single transaction or many. The buyer may be a local business or an interstate concern, ordering directly from the seller's headquarters or solely through the local hometown agent.

This array of considerations complicates efforts to adjudicate such jurisdictional challenges in a reasoned and coherent manner. We believe, however, that the crux of the distinction between passive and active buyers stems from a concern for unfair surprise, both in terms of reasonable notice and financial preparedness. Mail-order customers, for example, probably would not expect to be subject to suit in a foreign jurisdiction and often would not find it financially worthwhile to defend an action there. We therefore agree with other jurists and commentators who have noted the unfairness of asserting jurisdiction over out-of-state customers to collect payments due on modest personal purchases. *Baxter v. Mouzavires*, 455 U.S. at 1006, 102 S.Ct. at 1643; *In-Flight Devices Corp.*, 466 F.2d at 232; Currie, *supra*, at 574-77. *Cf. Rush v. Savchuk*, 444 U.S. 320, 329, 100 S.Ct. 571, 577-78, 62 L.Ed.2d 516 (1980) (insured not expected to defend suit in every state where insurer does business). A contrary result would sanction suit against mail-order customers in the home office's state even though they had never set foot there and even though the price they paid could not be lowered to reflect the risk of suit. Consumers would inevitably suffer a spate of default judgments if defense of small claims required a cross-country trek whose costs exceeded the expense of judgment itself. *McGee*, 355 U.S. at 223, 78 S.Ct. at 201. Counsel for Burger King agrees that such an outcome would be fundamentally unfair.

Our concern for adequate notice and fairness to buyers does not of course necessitate a broad rule immunizing purchasers generally from suit in the seller's home state. Where commercial parties of comparable bargaining strength contract for performance of manufacturing or services within that state's bounds, we have consistently held that jurisdiction comports with due process, even if negotiations occur elsewhere. *Standard Fittings Co. v. Sapag, S.A.*, 625 F.2d 630, 644-45 (5th Cir.1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1981, 68 L.Ed.2d 299 (1981); *Gold Kist Inc. v. Baskin-Robbins Ice Cream Co.*, 623 F.2d 375, 382 (5th Cir.1980); *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir.1980) (per curiam); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974). *But see Lakeside Bridge & Steel v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907, 100 S.Ct. 1087, 63 L.Ed.2d 325 (1980). In short, the principle of fairness which is the essence of due process must be the compass which guides our inquiry.

We recognize that this case, in aspects, resembles commercial transactions which properly give rise to jurisdiction. Rudzewicz and MacShara were two Michigan entrepreneurs eager for the profits a franchise could promise. They signed contracts calling for payments exceeding $1 million over the life of the venture. Despite the expense of the transaction and its commercial end, however, we are troubled by elements of surprise which, if sanctioned, could ultimately sow the seeds of default judgments against franchisees owing smaller debts.

[6] Nothing in the course of the negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contact Rudzewicz had with Burger King throughout months of

protracted negotiations was with representatives of the Michigan office. Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony. There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he has never even visited the state.

The contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains. The sale, which involved the use of an intangible trademark in Michigan and occupancy of a Burger King facility there, required no performance in the state of Florida. Under the contract, the local Michigan district office was responsible for providing all of the services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from that office alone. To Rudzewicz, the Michigan office was for all intents and purposes that embodiment of Buger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters.[9] *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S.Ct.Rev. 77, 89-90; Comment, *Constitu-*

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9. This case bears a resemblance to *Arthur, Ross & Peters v. Housing, Inc.*, 508 F.2d 562 (5th Cir.1975) (adopting the opinion of the district court). Defendant, a North Carolina realtor, persuaded plaintiff, a Texas partnership, to purchase land in North Carolina. A lawsuit later ensued in Texas federal court. We agreed that the trial court lacked jurisdiction since performance of the contract was to occur entirely outside Texas borders. *Id.* at 565. *See also Hamilton Brothers, Inc. v. Peterson*, 445 F.2d 1334, 1336-37 (5th Cir.1971).

tional Limits on State Long Arm Jurisdiction, 49 U.Chi.L. Rev. 156, 167 n. 56 (1982).

Given that the office in Rudzewicz' home state conducted all of the negotiations and wholly supervised the contract, we believe that he had reason to assume that the state of the supervisory office would be the same state in which Burger King would file suit. Rudzewicz lacked fair notice that the distant corporate headquarters which insulated itself from direct dealings with him would later seek to assert jurisdiction over him in the courts of its own home state.[10] We believe that this is one of those cases where "there is something to the notion that a party who has gone into a foreign State to do business with one of its residents can be expected to go back to bring suit." Currie, *supra*, at 574.[11]

Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. The franchise relationship in particular is fraught with potential for financial surprise. The device of the franchise gives local retailers the access to national

10. Burger King asserts that actual notice was provided by contractual provisions establishing that Florida was the state of the contract and that its choice-of-law rules would govern. We doubt, however, that boilerplate declarations in a lengthy printed contract suffice to provide actual notice of suit. In addition, *Hanson v. Denckla* established that the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction. 357 U.S. at 254, 78 S.Ct. at 1240.

11. In reaching this conclusion, we find support in *Shaffer v. Heitner*. Defendants in both cases were sophisticated businessmen who had reason to understand that they were entering into a business relation with a corporation chartered in the forum state. Yet in each case it was reasonable to assume that all working contact with the corporation would emanate from another state—in *Shaffer*, from corporate headquarters in Arizona; in this case, from the district office in Birmingham, Michigan.

trademark recognition which enables them to compete with better-financed, more efficient chain stores. This national affiliation, however, does not alter the fact that the typical franchise store is a local concern serving at best a neighborhood or community. Neither the revenues of a local business nor the geographical range of its market prepares the average franchise owner for the cost of distant litigation. *Cf. In-Flight Devices Corp.*, 466 F.2d at 234 (a business that lacks substantial out-of-state sales may be financially unprepared to defend suit outside of its home base). In *World-Wide Volkswagen*, for example, the Court held a local car dealer immune from suit despite its participation in a nationwide servicing plan. The Court reached this conclusion because, in part the limited range of the retailer's market was unconducive to insuring against the cost of defending an out-of-state personal injury suit. 444 U.S. at 297-98, 100 S.Ct. at 567-68. The same consideration militates against jurisdiction in this case.

The particular distribution of bargaining power in the franchise relationship further impairs the franchisee's financial preparedness. In a franchise contract, "the franchisor normally occupies [the] dominant role . . ." Annot., 67 A.L.R.3d 1299, 1302 (1975). *See, e.g., Shell Oil Co. v. Marinello*, 63 N.J. 402, 307 A.2d 598, 67 A.L.R.3d 1291 (1973), *cert. denied*, 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed. 2d 475 (1974). In recent years, certain states, including Michigan, have moved to enact statutes to police the more flagrant excesses of franchises. Annot., 67 A.L.R.3d at 1301.

We discern a characteristic disparity of bargaining power in the facts of this case. There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit

in Florida.[12] He signed a standard form contract whose terms were non-negotiable and which appeared in some respects to vary from the more favorable terms agreed to in earlier discussions. In fact, the final contract required a minimum monthly rent computed on a base far in excess of that discussed in oral negotiations. Burger King resisted price concessions, only to sue Rudzewicz far from home.[13] In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.[14]

In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida.

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12. *See supra* note 4. Following protests on Rudzewicz' part, Burger King reduced the monthly minimum rent for the third year of the contract from $5,286.58 to $4,416.66. The reduction represented savings of $10,439.04. While sizable, this amount pales against the $641,900 disparity between the total rent Rudzewicz expected to pay and the amount Burger King charged.

13. We note that several Burger King franchisees have challenged personal jurisdiction in Florida courts without success. *See Burger King Corp. v. Elliott*, No. 80-2694-CIV-EBD (S.D.Fla. Jan. 9, 1981); *Burger King Corp. v. Wagner*, No. 80-942-CIV-EBD (S.D.Fla. July 16, 1980); *Burger King Corp. v. Robinson*, No. 79-5824-CIV-EPS (S.D.Fla. May 30, 1980); *Burger King Corp. v. Snow*, No. 80-295-CIV-SMA (S.D.Fla. March 18, 1980); *Burger King Corp. v. Levine*, No. 80-5852(08) (Cir.Ct.Fla. July 21, 1980).

14. Burger King urges us to impute MacShara's matriculation at Burger King University to Rudzewicz for purposes of minimum contacts. The company reasons that the ties of one partner can be attributed to all partners for suits arising out of their common ventures. We need not decide that question here, however, since Rudzewicz and MacShara never formed a partnership. They signed the agreements in their individual capacities. We conclude that contacts cannot be attributed from one individual defendant to another because "[t]he requirements of *International Shoe* . . . must be met as to *each* defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 579, 62 L.Ed.2d 516 (1980) (emphasis added).

Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. We therefore reverse the judgment and remand with directions to vacate the judgment and dismiss the case.

REVERSED and REMANDED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the decision of the majority that appellant did not have sufficient minimum contacts with the state of Florida to support the exercise of personal jurisdiction by a federal district court sitting in diversity. To decide whether the exercise of jurisdiction comports with the requirements of due process, this Court must determine whether the defendant "has purposefully availed himself of the benefits and protection of the forum state's laws, whether the forum state has any special interest in exercising jurisdiction, and whether the convenience of the parties favors litigating in another state." *Austin v. North American Forest Products*, 656 F.2d 1076, 1089 (5th Cir.1981) (citing *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir.1974)).[1]

This Court has recognized that the purposeful availment prong of the *Product Promotions* test may be satisfied even if the defendant performs no physical acts within the forum state, as long as his contacts with the forum were "'deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable, if not foreseen, rather than a surprise'." *Austin, supra*, at 1089-90 (quoting *Prod-*

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1. The Eleventh Circuit Court of Appeals has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its Governing body of precedent, which is binding unless and until overruled or modified by this Court en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

uct Promotions, supra, at 496) (footnotes omitted). In *Marathon Metallic Building Co. v. Mountain Empire Construction Co.,* 653 F.2d 921 (5th Cir.1981) (per curiam), the Court determined that the purposeful availment prong was satisfied when the defendant entered a contract that specifically provided that it would be governed by the laws of the forum state. *Id.* at 923. In this case, both the franchise agreement and the lease signed by appellant and Burger King specifically provided that the laws of Florida would govern their interpretation. Thus, appellant has purposefully availed himself of the benefits and protections of Florida's laws.

The forum state has a special interest in exercising jurisdiction when the contract in dispute calls for the application of the forum state's laws. *See Marathon, supra,* at 923 (forum has interest when contract requires application of forum's laws); *Product Promotions, supra,* at 498 (forum has interest when its laws will be "of some relevance in resolving the suit"). Thus, Florida here has a special interest in exercising jurisdiction over appellant.

Finally, no great imbalance of convenience here argues for one forum over the other. Appellant cannot successfully argue that, because a large corporation sues him as an individual, the inconvenience to him can defeat personal jurisdiction. *See Marathon, supra,* at 923

Ignoring this binding precedent, the majority opinion questions whether appellant had reasonable notice of the possibility that he would be haled into court in Florida and whether he was adequately prepared for that contingency, and it warns that a determination that jurisdiction exists in this case may mean that consumers, nonresident purchasers whom the majority likens to appellant, also will be subjected to the jurisdiction of foreign

courts simply because they have purchased goods under contracts requiring them to remit payment to the foreign state. In raising this specter, the majority does not give proper weight to the recognized fact that appellant was a senior partner in a Michigan accounting firm, who for five months conducted negotiations with Burger King over the terms of the franchise and lease agreements, and who obligated himself personally to contracts requiring over time payments that exceeded $1 million. Appellant, who clearly does not resemble the average consumer, signed contracts that explicitly provided that Florida law would govern their interpretation. He therefore had reasonable notice of the possibility that he would be sued under the contracts in the state of Florida, and he should have been adequately prepared for that contingency.

(Filed March 22, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5424

BURGER KING CORPORATION,
a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MacSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 13, 11 Cir., 1984, ... F.2d .....).

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor it of (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 82-5424
D.C. Docket No. 81-1145-CIV-K

BURGER KING CORPORATION, a Florida corporation,
Plaintiff-Appellee,

versus

BRIAN MacSHARA,
Defendant,

JOHN RUDZEWICZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before VANCE and JOHNSON, Circuit Judges, and PITTMAN*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court with directions to vacate the judgment and dismiss the case in accordance with the opinion of this Court;

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 13, 1984

For the Court: Spencer D. Mercer, Clerk

By: /s/ (Illegible) Deputy Clerk

ISSUED AS MANDATE: May 7, 1984

Office - Supreme Court, U.S.
FILED
NOV 15 1984
L. STEVAS.
CLERK

No. 83-2097

In the Supreme Court of the United States

October Term, 1984

BURGER KING CORPORATION,
a Florida Corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF OF APPELLANT

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November 14, 1984

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1254(2) BECAUSE THE CIRCUIT COURT HELD THAT §48.193(1)(g) OF THE FLORIDA STATUTES—WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA—IS UNCONSTITUTIONAL AS APPLIED.

2. WHETHER THE CIRCUIT COURT ERRED IN HOLDING UNCONSTITUTIONAL, AS VIOLATIVE OF THE FOURTEENTH AMENDMENT DUE-PROCESS CLAUSE, §48.193(1)(g) OF THE FLORIDA STATUTES, WHICH CONFERS LONG-ARM JURISDICTION UPON ONE WHO BREACHES A CONTRACT IN FLORIDA BY FAILING TO PERFORM ACTS REQUIRED BY THE CONTRACT TO BE PERFORMED IN FLORIDA.

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OPINION BELOW

The opinion of the circuit court is reported as *Burger King Corporation v. MacShara*, 724 F.2d 1505 (11th Cir. 1984), and appears in the Joint Appendix at J.A. 166.[1] The district court's Findings of Fact and Conclusions of Law and Order thereon appear at J.A. 152, the Final Judgment at J.A. 164; neither are reported.

JURISDICTION

This was an action growing out of a franchise relationship, and the district court's jurisdiction was invoked on the basis of diversity of citizenship under 28 U.S.C. §1332; as well as federal-question jurisdiction under the federal trademark laws, *see* 18 U.S.C. §1121 and 28 U.S.C. §1338 (J.A. 120). The decision and opinion of the circuit court were entered on February 13, 1984 (J.A. 166). A timely petition for rehearing and suggestion for rehearing en banc were entertained and denied on March 22 (J.A. 186). The circuit court's judgment issued May 7 (J.A. 188). The notice of appeal was filed in the circuit court on May 21, 1984 (A. 41), within 90 days of that court's denial of rehearing. Invoking this Court's jurisdiction under 28 U.S.C. §1254(2), the appeal was docketed on June 19, 1984, within the same 90 days. In an order dated October 1, 1984, this Court postponed further consideration of the question of jurisdiction until a hearing on the merits.

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1. "J.A." refers to the Joint Appendix. "A." refers to the Appendix to the Jurisdictional Statement. "R." refers to the Record on Appeal in the circuit court. "Tr." refers to Volumes V-VII of the Record on Appeal--consisting of the separately-paginated transcript of the trial in this case. "X." refers to trial exhibits. The appellee's co-defendant at the trial, Brian MacShara, did not appeal the judgment of the district court, *see* J.A. 168 n.1, and is not a party to this proceeding. There are no parties other than Mr. Rudzewicz and Burger King Corporation—a wholly-owned subsidiary of the Pillsbury Company.

CONSTITUTIONAL PROVISION AND FLORIDA STATUTE

Fourteenth Amendment, United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Section 48.193, Fla. Stat. (1983):

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:
>
> • • •
>
> (b) Commits a tortious act within this state.
>
> • • •
>
> (g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this state.

STATEMENT OF THE CASE

I. *The Litigation.* This case presents jurisdictional issues which arose in the course of litigation instituted by appellant Burger King Corporation, a Florida corporation, against appellee Rudzewicz, a Michigan resident, in the federal district court for the Southern District of Florida (J.A. 120). Burger King alleged that Mr. Rudzewicz and his co-franchisee owed it $163,604.54 under franchise and lease agreements (J.A. 128), and that the franchisees, through continued operation of their Burger King restaurant after termination of the franchise, were acting in

violation of both federal and Florida trademark laws (J.A. 120, 125, 130-35). After rejecting Mr. Rudzewicz' motion to dismiss for lack of personal jurisdiction (J.A. 138), the district court entered judgment for Burger King on the contract claims (J.A. 160), and found that the franchisees' continued use of Burger King's tradenames and marks constituted infringement, awarding the injunctive relief requested (J.A. 159, 162-63). Before the appeal, however, Mr. Rudzewicz compromised and waived his right to appeal the infringement claim, conceding his improper use of Burger King's tradenames and marks (R. 804-14).

Nevertheless, Mr. Rudzewicz' appeal challenged not only the substantive finding of breach of contract, but also the district court's ruling on the issue of personal jurisdiction. Acknowledging the parties' agreement that Mr. Rudzewicz' conduct satisfied the statutory requirement for long-arm jurisdiction because he failed to make payments in Florida (J.A. 171-72), the circuit court nonetheless held that application of the statute violated Mr. Rudzewicz' due-process rights, because he lacked the requisite minimum contacts with the forum (J.A. 172, 183). This appeal followed.

The propriety of the circuit court's holding depends upon the nature of the relationship between Burger King and Mr. Rudzewicz—and in particular the extent to which Mr. Rudzewicz voluntarily created that relationship for his own benefit. In the following pages, we will examine that relationship by describing 1) the pertinent attributes of Burger King and Mr. Rudzewicz as economic actors; 2) the structure of the joint endeavor which their contract established; and 3) their course of dealing under that contract. The jurisdictional facts are largely undisputed.

II. *The Parties.* The franchisor, appellant Burger King Corporation, is a Florida corporation with its principal offices, including all of its business records, in Miami (J.A.

168; R. 183-87; Tr. 83). As the complaint alleged and Mr. Rudzewicz admitted (J.A. 130, 143), Burger King is one of the world's largest restaurant organizations, with over 3,000 restaurants in its system. As Burger King advised the prospective franchisees in January of 1979 (J.A. 10), Burger King does business in all 50 states, the Commonwealth of Puerto Rico, and 8 other nations. Approximately 80% of that business is conducted through franchised units (*see* J.A. 11). In 1978, that business produced net sales of $479,082,000.00 (X. 21, 24th page; Tr. 171).

Appellee John Rudzewicz is a resident and citizen of Michigan; he is a certified public accountant, the senior partner in a Michigan accounting firm which employs 50 people, and which at the time in question represented a client who owned three Burger King franchises. Mr. Rudzewicz' job is to give financial advice to people. In 1978 he had an income of $170,000.00, and he showed Burger King a net worth of $1,125,000.00. *See* Tr. 39, 40-41, 425, 434-36, 450, 476-77.[2] The district court described Mr. Rudzewicz as an "experienced and sophisticated" businessman (J.A. 158; *see* Tr. 648, 649).

III. *The Contracts.* The joint undertaking of Burger King and Mr. Rudzewicz was defined through four principal documents: the offering circular (J.A. 7; X. 21, Tr. 167, 171); the preliminary agreement (J.A. 37; X. 3, Tr. 46, 47); the franchise agreement (J.A. 41; X. 8, Tr. 53-54); and the lease agreement (J.A. 76; X. 9, Tr. 55). Although lengthy and complex, these documents are consistent in emphasizing the central characteristics of this franchise relationship:

A. *The Benefits to the Franchisees.* Burger King leased the restaurant facility to the franchisees (J.A. 79);

2. Burger King franchisees are required to have a net worth of $140,000—with $95,000 liquid. X. 21, 35th page; Tr. 171.

and licensed them to use its trademarks for a period of 20 years (J.A. 45, 57-58). In so doing, Burger King conferred upon the franchisees the benefit of its "high reputation and a positive image with the public as to the quality of products and services available at Burger King restaurants . . ." (J.A. 43); and committed itself to enhance its "positive image" through "advertising, sales promotion and public relations both in the market area . . . in which the Franchised Restaurant is located and on a national basis . . ." (J.A. 54).

The advantages of the trademarks and reputation of Burger King would have been lost to the franchisees, however, unless they also possessed the practical skills needed to operate the restaurant. A good part of these agreements, therefore, specified the operational benefits that Burger King would confer. Burger King would endeavor to obtain "a suitable location within the designated area for the establishment of FRANCHISEE's Franchised Restaurant" (J.A. 37). It would make available "[s]tandard plans and specifications for a free-standing building including furnishings, decor, layout and signs, together with advice and consultation" (J.A. 51).[3] And it would provide a "[p]re-opening training program," "[p]re-opening and opening supervision and assistance," and "[o]pening promotion programs" (J.A. 51).

3. The lease agreement provides some detail about these specifications, requiring approval of all building plans by Burger King's architect (J.A. 79-80); compliance by the franchisees with any request by Burger King to alter the interior or exterior "to reflect the then current image of Burger King Restaurants" (J.A. 90); secural of Burger King's consent to any alterations by the lessees (id.); compliance with any request by Burger King for alterations in the building, to insure conformity with "the then current image of Burger King Restaurants" (id.); approval by Burger King of any signs on the premises (J.A. 93); acknowledgement of Burger King's right of inspection (id.); and the requirement that any restoration of damage to the building "shall reflect the then current image of Burger King Restaurants and conform to the then current design and specifications of Lessor" (J.A. 94).

Operational assistance, however, extended beyond the start-up. Training programs, involving not merely employees but "a designated restaurant manager" (J.A. 53), as well as the franchisee, were prescribed in elaborate length, not only at the outset of the franchise operation (J.A. 39), but also "from time to time . . . in order to implement current operational standards" (J.A. 53). And Burger King's active support extended into day-to-day operations. It offered a "confidential MOD Manual containing the standards, specifications, procedures and methods for operating a Burger King Restaurant" (J.A. 52); "[a] standardized accounting, cost control and inventory control system" (id.); and updates regarding any "new developments, techniques and improvements of BKC in food preparation, equipment, food products, packaging and restaurant management . . ." (J.A. 52). And Burger King agreed to make available "field personnel . . . to assist the franchisee with any individual problems he may encounter" (J.A. 27).

B. *The Benefits to the Franchisor.* In return for these substantial marketing services, the franchisees agreed to pay Burger King a franchise fee of $40,000.00 (J.A. 46); a royalty of 3.5% of gross sales for the use of Burger King's tradenames and marks (J.A. 54); a fee for advertising and sales promotion of 4% of the franchisees' monthly gross sales (J.A. 54); and a specified amount of rent, which might be increased to no more than 8 1/2% of the franchisees' monthly gross sales (J.A. 82).

C. *The Shared Risks of the Franchisor and Franchisee.* The parties to this agreement obviously intended that it would produce benefits for both sides; Burger King would obtain the royalties and other fees, and the franchisees would retain the remaining profits. Of course the central threat to that objective was the risk that the franchise would fail. Implicit in the parties' agreement was

an assumption that the chief cause of such failure would be the franchisees' deviation from central operating standards, resulting in a loss of patronage for the franchisees, and a loss to Burger King of income and goodwill, built up through its trademarks, advertising, and record of success.[4]

In an effort to reduce the risk of failure by assuring the quality of services, the parties agreed to a series of measures designed to maintain the character of the Burger King system:

1. The training and operations' assistance which Burger King agreed to supply the franchisees was in large measure identified as a *mandatory* feature of the arrangement. Thus, "[a]s a condition precedent of the Franchise Restaurant opening, FRANCHISEE and a designated man-

---

4. Thus the first four paragraphs of the franchise agreement make clear that the benefits to both sides of this agreement derive from a mutual effort to achieve the goals of a uniform system (J.A. 43-44):

> A. BKC is the owner of certain trademarks and service marks including BURGER KING which has been registered with the United States Patent and Trademark Office.
>
> B. BKC has developed a restaurant format and operating system, including a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered, and procedures for inventory and management control (the Burger King System) and is engaged in the business of operating and granting franchises to operate Burger King Restaurants using the Burger King System and the marks BURGER KING and WHOPPER and such other marks as may be authorized from time to time for use in connection with Burger King Restaurants (the Burger King Marks).
>
> C. BKC has established a high reputation and a positive image with the public as to the quality of products and services available at Burger King Restaurants, which reputation and image have been and continue to be unique benefits to BKC and its Franchisees.
>
> D. FRANCHISEE recognizes the benefits to be derived from being identified with and licensed by BKC, and being able to utilize the Burger King System and the Burger King Marks which BKC makes available to its franchisees.

ager shall complete BKC's training program at locations specified by BKC" (J.A. 39). Building standards, as well as signs, equipment, and furnishing specifications, were equally obligatory (J.A. 39, 48). And perhaps most important, adherence to operating standards, established and detailed in the Manual of Operating Data (MOD Manual), or otherwise fixed by Burger King, was specified as "reasonable, necessary and essential to the image and success of each Burger King Restaurant and the Burger King Restaurant System" (J.A. 47).

2. The agreements emphasize these mandatory requirements as essential to maintain a *uniform* system. Burger King attributed its "high reputation and . . . positive image" in important part to "a recognized design, decor, color scheme and style of building, uniform standards, specifications and procedures of operation, quality and uniformity of products and services offered . . ." (J.A. 43).[5]

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5. Thus, under the heading of "Standards and Uniformity of Operation" (J.A. 46-47), the franchise agreement makes clear that the various specifications in these contracts are designed to insure conformity with a *system* of operating:

> The Burger King System is a comprehensive restaurant format and operating system for the sale of uniform and quality food products, emphasizing prompt and courteous service in a pleasant atmosphere. The establishment and maintenance of a close personal relationship between BKC and FRANCHISEE in the operation of the Franchised Restaurant and adherence to the principles of the Burger King System constitute the basic underlying substance of this license.
>
> Suggestions from franchisees for improving products, equipment, uniforms, restaurant facilities, service format and advertising are encouraged and will be considered by BKC when adopting or modifying standards, specifications and procedures for the Burger King System.
>
> FRANCHISEE acknowledges and agrees that adherence to BKC's restaurant design and color schemes, signage, interior decor and equipment systems requirements, menu and service format and the provisions of the Manual of Operating Data (MOD Manual) are reasonable, necessary

(Continued on following page)

To assure such conformity, these agreements either permit no deviation from specified requirements (standards of food preparation (J.A. 49), uniforms (J.A. 50), advertising (*id.*)); or allow modification only if "approved in writing by BKC" (J.A. 49, installation of vending machines). It would literally be impossible to quote all of the detailed quality controls enforced by Burger King in these agreements (*see generally* J.A. 7, 22, 24-33, 31, 37, 39, 48-50, 79-80, 83-84, 90, 93-94, 107, 118). The smallest details are prescribed, from the menu (J.A. 7); to the "quality, appearance, size, taste, and processing" of products (J.A. 26); to the "signs, equipment and furnishings" (J.A. 39); to the telephones, newspaper racks, and vending machines (J.A. 49); to the "ingredients, methods of preparation and service, weight and dimensions of products served, and standards of cleanliness, health and sanitation" as well as packaging (*id.*); to the minimum hours and days that the restaurant would be open (J.A. 49-50). Of course, Burger King maintained a right of inspection to insure conformity with all of these requirements (J.A. 39, 50).

Footnote continued—

> and essential to the image and success of each Burger King Restaurant and the Burger King Restaurant System. The MOD Manual contains the official mandatory restaurant operating standards, specifications and procedures prescribed from time to time by BKC for the operation of a Burger King Restaurant. The MOD Manual shall be kept at the Franchised Restaurant at all times and all changes or additions shall be inserted upon receipt. FRANCHISEE agrees that changes in the standards, specifications and procedues [sic] may become necessary and desirable from time to time and agrees to accept and comply with such modifications, revisions and additions to the MOD Manual which BKC in the good faith exercise of its judgment believes to be desirable and reasonably necessary. The confidential and proprietary material and information of BKC set forth in the MOD Manual is to be used by FRANCHISEE only in connection with the operation of the Franchised Restaurant and other licensed Burger King Restaurants. The MOD Manual and other specifications, standards and operating procedures communicated in writing to FRANCHISEE shall be deemed a part of this Agreement.

When the franchisees entered into these agreements, they could have no doubt that they were not simply purchasing a restaurant, but entering into an "operating system (the Burger King System)" (J.A. 37).

3. Finally, the agreements address the risk of business failure through a complex commitment to *joint accountability*. Thus, Burger King insisted upon "a strong personal identification between the individual applicant and the management and ownership of the franchised unit" (J.A. 31). To this end, "at least one of the named franchisees must personally participate in the direct operation" of the restaurant (*id.*); and the agreement elaborately and carefully regulates the assignment, inheritance, and sale of any franchise (J.A. 61-66). To reenforce this accountability in the franchisees, the agreement confers upon Burger King extensive rights to monitor operation of the franchise, not only by the physical inspection noted above, but also by elaborate accounting requirements (J.A. 55-56, 83-84; X. 21, 37th page; Tr. 171).

To underline the importance of the franchisees' participation in a centralized system, and to emphasize Burger King's determination to insure compliance with that system, these agreements repeatedly focus the franchisees' attention toward Burger King's national headquarters in Miami. They identify Burger King as a Florida corporation centered in Miami (J.A. 11, 37, 43, 72, 79). They provide that relevant notices must be sent to Miami (J.A. 73, 118). They provide that relevant payments should be sent to Miami (J.A. 118; R. 184, 185; Tr. 85-86).[6] The

6. Under the franchise agreement, the amount of royalty and advertising payments are computed as a percentage of sales, and all sales figures are kept in the Miami office (Tr. 146, 151-53). They are fed into the central computer, and the amount of royalty and advertising fees assessed (Tr. 88, 161-62). The Miami computer also runs the sales figures against the lease agreement's requirement (J.A. 82) that rental payments

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franchise agreement declares that it is made in Miami (J.A. 43). Both the lease and franchise agreements call for the application of Florida law (J.A. 72, 118).[7] Finally, the lease agreement calls for arbitration in the event of some partial condemnation or restoration of the premises (J.A. 107), and requires that such arbitration "shall" be held in Miami (J.A. 118). Thus, just as the agreements prescribe and define a uniform franchising system, so do they identify Miami as the source of that system.

On the basis of these documents alone, it is fair to conclude that the franchisees knew that they were entering into a long-term relationship with the Burger King headquarters in Miami. As the franchise agreement advised them: "The establishment and maintenance of a close personal relationship between BKC and FRANCHISEE in the operation of the Franchised Restaurant and adherence to the principles of the Burger King System constitute the basic underlying substance of this license" (J.A. 46-47). That kind of relationship, with the central objective of securing compliance with uniform operating standards, is a defining characteristic of the franchise. *See* H. Brown, *Franchising Realities and Remedies* 16 (1978). As Burger King's offering circular advised the franchisees in this

Footnote continued—

be enhanced to 8 1/2% of total sales in the event that that calculation produces a higher rent than the amount of rent specified in the lease (Tr. 210). Likewise, it is Burger King's Miami office which is billed for all real estate taxes, and which then bills the franchisees (Tr. 86, 89, 133).

7. The franchise agreement also provides that this "choice of law designation does not require that all suits concerning this Agreement be filed in Florida" (J.A. 72)—which should have suggested to the franchisees that such suits *may* be filed in Florida. It provides further that the franchisee (but not the franchisor) is required to conduct his business in a manner which complies with the law of the state or political subdivision in which the restaurant is located (J.A. 72); and that if any provision of the contract is invalid under Florida law, it may be validated by reference to the law of the state in which the restaurant is located (J.A. 72-73).

case, it is the key to success for both sides: "Uniformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor" (J.A. 31). Of course the franchisee gives up a measure of independence; but as these agreements make clear, the franchisee receives substantial marketing benefits in return.[8] One of the obvious benefits is that the franchisee's investment of money and skill is substantially less.[9] That is in part a product of the franchisor's centralization; it would clearly cost Burger King more to fragment its policymaking apparatus in more than one location, and that cost would clearly be passed on to franchisees. The terms of the agreements just summarized, therefore, embrace the central attributes of a franchise relationship. And those attributes were clear to the franchisees from the very beginning.

IV. *The Parties' Actual Course of Dealings.* From start to finish, the actual course of dealings between Burger King and Mr. Rudzewicz confirmed what the agreements require—a continuing involvement by Burger King's Miami headquarters with Mr. Rudzewicz' Michigan operation, and a parallel involvement by Mr. Rudzewicz with Burger King's Miami policymaking.

Burger King did not solicit the business of Mr. Rudzewicz and his co-franchisee Brian MacShara (Tr. 428). The idea was Mr. MacShara's; he brought in Mr. Rudzewicz,

8. *See generally* H. Brown, *supra*, at iv, 1 n.2, 2, 8-9; R. Dias and S. Gurnick, *Franchising, the Investor's Complete Handbook* 15-16, 21 (1969); R. Metz, *Franchising: How to Select a Business of Your Own* 11-12 (1969); Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. L. & Ec. 227-28, 230 (1978).

9. *See Ungar v. Dunkin Donuts of America, Inc.*, 531 F.2d 1211, 1222 (3rd Cir.), cert. denied, 429 U.S. 823 (1976); H. Brown, *supra*, at 9, 16-17, 22-23; R. Dias and S. Gurnick, *supra*, at 21; R. Metz, *supra*, at 10; Caves, *Franchising: Firms, Markets, and Intangible Assets*, 42 South. Ec. J. 572, 574-75 (1976).

and the two solicited Burger King, seeking its "approval for franchise" (Tr. 42)—which application was "approved" (Tr. 45, 481; *see* X. 2, Tr. 44, 45; Tr. 428, 476). We should emphasize that the franchisees did not want simply to open a restaurant and sell hamburgers in Michigan. They wanted a *Burger King* restaurant—part of a nationwide network utilizing standardized facilities and trademarks—with national advertising, assistance from an experienced and centralized national organization, and a built-in clientele. They wanted to minimize their risks and their costs by trading autonomy for national interdependence. They sought out that relationship; they voluntarily created a contact with the forum.[10]

The negotiations began in the Fall of 1978 (Tr. 42). From almost the first contact, until the lawsuit was filed over three years later, as the following discussion makes clear, the franchisees dealt directly and repeatedly with Burger King's Miami office.[11] The initial franchise offer-

10. As Burger King noted in its letter approving their application (X. 2; Tr. 44, 45), its "experience and record of success minimizes the possibility of failure . . . ." That letter also advised the franchisees that their building must be "approved," that their equipment must be "standard," that they were "responsible" for purchasing certain specified equipment, and that any requests for deviation had to be "channeled through" Burger King's district office. From the very start, therefore, the franchisees knew that they were buying into a system involving tight control by Burger King.

11. The circuit court's opinion states that Burger King's Michigan district office was "Burger King's sole representative in dealing with Rudzewicz and MacShara" (J.A. 169). We do acknowledge that the franchisees had direct contact with the district office, mostly in the ministerial context of forwarding information or inquiries to Miami (*see, e.g.*, Tr. 128-29, 131, 138-41, 158-61, 388, 494-95, 523). There is no evidence, however, that the district office had any independent decisionmaking authority. For example, requests for changes in the building design or equipment were "channeled through" the district office to Miami (X. 2; Tr. 44, 45); the district office was helpless to waive the required site development fee, and referred Mr. Rudzewicz to Miami (Tr. 416); and the same thing happened regarding the important amount of rent (Tr. 293-95, 363, 496). As the following

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ing circular, providing preliminary information to the prospective franchisees, was prepared in Miami and sent to Mr. Rudzewicz and Mr. MacShara in January of 1979 (J.A. 7; X. 21, Tr. 167, 171; *see* 167-73, 262). It was the Miami office which negotiated with the State of Michigan concerning the contents of this offering circular for Michigan residents (Tr. 171-72, 187-88, 227-29, 235-39). In addition to outlining the interdependent nature of the franchise relationship, it also provided the franchisees with advance copies of the lease and franchise agreements which they eventually signed (*see* X. 21—not reprinted in Joint Appendix).

In February of 1979, the franchisees entered into a preliminary agreement for the purchase of a Burger King franchise, which covered a 12-month period in which to agree upon an acceptable site (J.A. 37; X. 3, Tr. 46, 47). That document, as we have noted already, emphasized the long-term relationship into which the franchisees were entering. After they signed it, in consultation with Burger King's Michigan people, the franchisees decided to acquire an existing Burger King restaurant in Drayton Plains, Michigan (Tr. 322, 477).[12] In March—before either a

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discussion makes clear, the franchisees not only dealt directly with Burger King's Miami office, but did so on the key policy questions which became the subject matter of the litigation. We note, for example, the following written correspondence between the franchisees and the Miami office: X. 4 (Tr. 48); X. 5 (Tr. 49); X. 6 (Tr. 50); X. 7 (Tr. 51-52); X. 16 (Tr. 73); X. 17 (Tr. 73, 74); X. 18 (Tr. 76); X. 19 (Tr. 76-77); X. 22 (Tr. 177); X. A (Tr. 97); X. B (Tr. 102); X. F (Tr. 131); X. G (Tr. 141, 142); X. K (Tr. 314, 317-18).

12. The circuit court's opinion states that it was Burger King's Michigan district manager who "persuaded" the franchisees to acquire an existing store rather than incurring the higher cost of building a new one (J.A. 169). We have been unable to find any evidence of record supporting this conclusion. To the contrary, the franchisees never contemplated building a new store, and never asked for approval to build a new store,

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lease or franchise agreement had been made—the franchisees contracted with Burger King's Davmor division, which is located in Miami, for the purchase of store equipment (X. W, pp. 3-8; Tr. 371, 378; *see* Tr. 86, 89, 153, 233, 272, 274, 369-72, 461, 463, 488, 597). Like all the others, this contract identifies Burger King as a Florida corporation, and provides in its last paragraph—just above the signatures—that it is governed by Florida law (X. W at 3, 8). The Davmor division billed the franchisees from Miami, and they made payments back to Miami (Tr. 89, 155).[13]

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because they knew from the start that they could not afford one; they also wanted an existing store because that was faster; and it was the franchisees who decided on the specific site and "pushed" for it (Tr. 484), and who then were told by Burger King that it was available. *See* Tr. 312, 484-86.

13. The circuit court's opinion states that Burger King's Michigan district manager "convinced" the franchisees to purchase the equipment before the final franchise and lease agreements, containing the precise amount of rent, had been written (J.A. 169). In contrast, the trial court found that none of the franchisees' decisions were the product of "economic duress or disadvantage" (J.A. 158). To the extent that this finding is relevant to the parties' bargaining strength, and thus to the fairness of Mr. Rudzewicz' subjection to the jurisdiction of a Florida court, it is a jurisdictional finding no less entitled to deference than any other factual finding; it may be set aside only if clearly erroneous under Rule 52(a), Fed. R. Civ. P. *See Combee v. Shell Oil Co.*, 615 F.2d 698, 700 (5th Cir. 1980); *Lyons v. Salve Regina College*, 565 F.2d 200, 203 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978). *See generally* 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2589, at 759 n.74 (1971). Thus, the jurisdictional facts must be considered in the light most favorable to the trial court's finding of jurisdiction, *see Glasser v. United States*, 315 U.S. 60, 80 (1942), taking all the fair inferences in that light, with due deference to the trial court's assessment of credibility, *see United States v. Espinoza-Franco*, 668 F.2d 848, 849 (5th Cir. 1982); and those findings may be disturbed only upon a firm conviction that a mistake of fact has been made. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

In this context, we respectfully submit that there is no evidence supporting the circuit court's conclusion that Burger King "convinced" the franchisees to contract for equipment before

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In April, co-franchisee MacShara attended courses at Burger King's training school in Miami (*see* X. Y; Tr. 381, 542; *see also* Tr. 506, 540).[14] In May, Burger King's Miami office received from the franchisees the papers which were necessary to permit preparation of the final lease and franchise agreements (Tr. 179, 197-98). As we have noted, note 13, *supra*, Burger King was anxious to get the store open by the end of its fiscal year, May 31. On May 29, Mr. Rudzewicz learned by telephone what his rent would be (Tr. 497). On May 30, he wrote a forceful letter to Burger King's Michigan office declaring his unilateral decision "to withhold all monies for equipment and other start-up costs for the above store" pending provision of the final lease and franchise agreements, an explanation of the rent and other charges, and sufficient time to get the store ready (X. M-E; Tr. 493, 495). The

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Footnote continued—

reviewing the relevant documents, or obtaining whatever other information they may have desired. To the contrary, Mr. Rudzewicz testified simply that Burger King provided him with an equipment list, and that he contracted with Davmor to purchase equipment (Tr. 463). There is general evidence that Burger King "encouraged" the franchisees to get the store open before the end of Burger King's fiscal year, or by May 31, 1979 (Tr. 461; *see* Tr. 52-53, 230-31, 288, 380); and Mr. Rudzewicz testified that he felt pressured to get the store ready by that date (Tr. 285, 380). As it turned out, with Burger King's compliance, the store did not open until June 4 (*see* X. X; Tr. 379, 381; *see also* Tr. 379-81). This is all the evidence we can find which bears on this question.

14. The circuit court found that this physical contact with the forum could not be attributed to Mr. Rudzewicz because he and Mr. MacShara "never formed a partnership" (J.A. 182 n.14). But the franchisees did form a partnership for the purpose of leasing equipment, called R.M.B.K.-2, to which partnership R.M.B.K. Corp. assertedly transferred all interest in its contract with Burger King's Davmor division (X. W). *See* Tr. 273, 438-39, 447-49, 458. In addition, the following documents refer to Mr. Rudzewicz and Mr. MacShara as "partners" in this franchise: X. 1 (Tr. 42, 43); X. 2 (Tr. 44, 45); X. 8, pp. 2, 9, 11 (Tr. 53-54). They were jointly and severally liable under both the franchise agreement (J.A. 74) and the lease agreement (J.A. 114). And throughout the trial, they continually referred to each other as "partners" (Tr. 43-44, 78, 99, 100, 103, 465, 467, 552, 561, 565, 624, 625).

letter declared that Mr. Rudzewicz had "no alternative except to stop all actions." It suggests that he was not very intimidated by Burger King's bargaining position.

As the circuit court found (J.A. 169), the rent quoted by Burger King was more than Mr. Rudzewicz had expected to pay. There was a good deal of testimony at trial, almost all of it from the franchisees' witnesses, about the extent to which that expectation was a reasonable product of Burger King's representations.[15] For its part, Burger King was content to impeach this testimony, *see* note 15, *supra*, and to rest with its contention (*see* Tr. 644)—which the trial court endorsed (J.A. 161)—that re-

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15. *See, e.g.*, Tr. 134-36, 150-51, 174, 265-72, 292, 294, 300, 304-08, 407-10, 416, 496. The controversy centered around the method by which Burger King computed the rent. The franchise offering sent to Mr. Rudzewicz in January of 1979 provides that the franchisee will pay a minimum rental of 13.4% of "approximated capitalized site acquisition and construction costs, or 8.5% of monthly gross sales, whichever is greater" (J.A. 23). The circuit court's opinion (J.A. 170 n.4) attributes to Mr. Rudzewicz the testimony that he simply assumed that because he was taking over an existing store, the "construction" cost to be utilized for the purpose of computing rent would be the cost of renovating the building—and nothing more (*see* Tr. 267, 269). Since the cost of remodeling was about $180,000.00, Mr. Rudzewicz, according to the circuit court (J.A. 170 n.4), figured that he would be paying between $2,000.00 and $2,500.00 a month (Tr. 267, 409-10). But as Mr. Rudzewicz acknowledged on cross-examination (Tr. 407), Burger King told him that the rent would be computed not simply on the cost of renovation, but also on the present value of the building; and as a certified public accountant, Mr. Rudzewicz acknowledged that the building would have some remaining value even after depreciation (Tr. 408). Thus, his own calculations were unreasonable. Apparently recognizing this problem, the circuit court's opinion states that Mr. Rudzewicz "boosted his projections" from around $2,000.00 to around $2,500.00 in order "to amortize the additional cost of original construction." To the contrary, Mr. Rudzewicz testified that his estimates were based on the cost of remodeling, and on the rental which was being paid by a nearby Burger King (Tr. 409-10). In short, he made an "assumption" (Tr. 410), because Burger King was *not* making any representations about the amount of rent. In this context, the circuit court's opinion states the facts in the light least favorable to the trial court's finding that Burger King made no misrepresentations about anything (J.A. 157).

gardless of any representations made before the lease agreement was signed, Mr. Rudzewicz signed it with full knowledge of the specific rent which he would be obligated to pay (*see* Tr. 294-95). Before doing so, however, he telephoned Burger King's regional office, and as the circuit court notes (J.A. 169-70), was told that the computation of rent was out of its hands (*see* Tr. 363, 496). The reason, as Mr. Rudzewicz was informed (Tr. 293-95), is that such questions are addressed by the Miami office (Tr. 85, 89, 135, 174, 463). After consultation with the Miami office, Mr. Rudzewicz was able to secure a reduction in rent for the third year of $10,439.04 (X. I; Tr. 222; *see* Tr. 223, 500).[16]

The lease and franchise agreements were prepared in the Miami office (Tr. 176). They were signed first by the franchisees in Michigan, and then by Burger King in Miami, which means that both contracts were made in Miami under Florida law.[17] We have discussed these

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16. The circuit court is right that this reduction is insignificant compared with the full amount of rent over 20 years (J.A. 182 n.12); but taken in the light most favorable to the trial court's finding of jurisdiction, it does suggest that Burger King lacked the unilateral power to dictate the terms of this contract. Thus, Mr. Rudzewicz was not faced with the distasteful choice of accepting the prescribed rent or ripping out the equipment which he had already installed in the premises (*see* J.A. 170). Moreover, as we have noted, nn. 13, 15, *supra*, the decision to purchase that equipment was Mr. Rudzewicz' alone; he twice acknowledged that he had purchased the equipment despite his inability to get a firm estimate of either the amount of rent or the method of computation (Tr. 410, 416).

17. The documents were prepared in Miami and sent to the franchisees in Michigan (X. 22, Tr. 176-77; X. 23, Tr. 177-78; *see* Tr. 202, 265). The franchisees signed the contracts at a "closing" held in Michigan on June 4, and returned them to Miami (J.A. 43, 79, 116). Sometime before June 7, Burger King's Miami office reduced the third-year rent in the lease agreement, initialed the change, and apparently sent the agreement back to Michigan for the franchisees' initials (*see* X. I; Tr. 222). Both the rent and franchise agreements were then signed by Burger King in Miami sometime before June 18, when fully-executed copies were sent back to the franchisees for their files (X. K; Tr. 314, 317-18; *see also* Tr. 201-02).

documents in great detail, and the regulatory mechanism which they established.

The store opened in early June, and in the Spring and Summer months the profits were quite good (Tr. 121, 148). The franchisees sent payments to Burger King's Davmor division in Miami under the contract for equipment (Tr. 92, 274, 458); and sent payments to Burger King in Miami for advertising and for real estate taxes (Tr. 91). As the circuit court noted (J.A. 168), the problems came with the Winter recession (*see* J.A. 158; Tr. 121, 123-24, 148, 533); between November of 1979 and April of 1981, the record discloses a series of communications from Burger King's Miami office to the franchisees, demanding that they bring their account up to date.[18]

Although the Michigan office was involved in this extended period of negotiation, there is no evidence that any of the Michigan officials had any decisionmaking authority, *see* note 11, *supra*. In contrast, this correspondence indicates that the Miami office controlled the negotiation. All matters relating to credit are handled in Miami—not through the regional offices (Tr. 84, 94-95, 107). It was the Miami office which determined the initial delinquency (Tr. 96), and requested the initial notices of default (X. C, Tr. 103; *see* Tr. 103-05, 163). And it was at least three different officials in the Miami office who engaged the franchisees in a continuous series of telephone conversations about how to work out the problem (Tr. 97-98, 100, 141-42, 151-52, 158, 165-66, 395-96, 524; *see* X. H, Tr. 221-22). Finally, after 18 months of negotiation, Burger

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18. In chronological order, these are X. A (Tr. 97; *see* Tr. 98, 163); X. B (Tr. 102); X. 16 (Tr. 73; *see* Tr. 74, 93-94, 194); X. 17 (Tr. 74; *see* Tr. 73-75); X. F (Tr. 131; *see* Tr. 131-32); X. G (Tr. 141, 142; *see* Tr. 165-66); X. 18 (Tr. 76); X. 19 (Tr. 76-77).

King brought the instant action in Miami,[19] claiming breach of contract and trademark infringement under both federal and Florida common law (J.A. 120, 130-35).[20]

SUMMARY OF THE ARGUMENT

It might be appropriate to begin by emphasizing what this case is not about. Suppose, for example, that Mr. Rudzewicz had opened his own local restaurant in Michigan, finding it necessary to order a piece of equipment from Florida. Under the language of §48.193(1)(g), and its consistent interpretation by the Florida courts, his default in payment would suffice to confer jurisdiction in Florida. Under such circumstances, we acknowledge a serious constitutional question. Personal jurisdiction is essentially a matter of relationships; and from a purely economic standpoint, a discrete monetary obligation has almost "zero impact in creating any extra-transactional relation between the participants in the market."[21] Thus,

19. During all this time, of course, the franchisees could have brought an action against Burger King in Michigan—asserting all the claims which they eventually asserted in their Florida counterclaim (J.A. 146). As we have noted, the franchise agreement permits either party to bring an action somewhere other than Florida (J.A. 72); and in fact, the initial offering circular informed the franchisees about a number of extant suits involving Burger King in jurisdictions other than Florida (J.A. 16-20).

20. Burger King's tradenames and trademarks are referred to throughout the documents (J.A. 29, 43, 57-58, 70, 139). They are found in X. 24 (Tr. 186-87). The franchise agreement created a license to use them (J.A. 45). The notice of termination advised the franchisees that they were in violation of federal and state trademark laws (X. 19; Tr. 76-77). Another notice demanded return of the store (X. F; Tr. 131-32). Testimony on the trademark claims is found at Tr. 67-72, 78-79, 184-87. Opening and closing arguments on these claims are found at Tr. 16-17, 608-10.

21. MacNeil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 Nw. U. L. Rev. 854, 856 n.4 (1978).

although we do not and need not concede the jurisdictional question in this example, we acknowledge its difficulty.

The circuit court's decision ends up at the wrong place because it starts at the wrong place, assuming that this case is no different from the hypothetical advanced above: "This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami" (J.A. 172). But this case is not about the failure to pay money in a "discrete transaction," MacNeil, *supra*, at 854. It concerns instead a "relational contract" at the other end of the economic spectrum—contemplating not simply a series of monetary payments in the future, *id.* at 857-58, but a variety of mutual obligations, both general and specific, which require continuing interaction between the parties. *See id.* at 866-67, 887.

The general character of the franchise relationship is described in the authorities cited at pages 11-12, *supra*. The attributes of this particular relationship have been exhaustively detailed. The purchase of this franchise was not a one-shot transaction—like an order from the Sears catalogue—after which both parties go their own way. The purpose of this contract was to bring the parties together—to *create* a relationship between them—to create risks and obligations on both sides, and foreseeable consequences of failure, on both sides.

In return, both sides obtain advantages. The franchisor obtains another outlet, and the promise of monetary gain. The franchisee receives the benefits of a national organization, its national advertising and reputation, its national infrastructure. The price is not simply a percentage of profits, but a measure of autonomy—in the franchisee's willingness to conform his behavior to a strict set of guidelines upon which his own success, and the franchisor's success, both depend.

It is only in the context of that relationship—a relationship extending from Miami to Michigan—that the trial court's exercise of jurisdiction can be assessed. It is that relationship—not the duty to pay money—which is dispositive of this case. The appellant's central contention is that when Mr. Rudzewicz rejected the option of casting his economic fortunes with a purely-local business, and chose instead the safer route of associating himself with a national organization based in Miami, he purposefully availed himself of the benefits and protection of the forum. He did so not simply by conferring an economic benefit on a Florida corporation, not simply by promising to arbitrate in Florida, or to send money and notices to Florida, and not simply by signing three separate contracts which conferred upon him the benefits and responsibilities prescribed by Florida law. In addition to all of this, he did so by agreeing to conduct a substantial portion of his business *in* Florida, to the extent that the finest details of his enterprise were prescribed and enforced *from* Florida. He did so because the conduct of his business was foreseeably dependent on decisions and instructions made elsewhere—in the context of an ongoing relationship. And because of that relationship, we suggest that jurisdiction in Florida would have been appropriate in this case (assuming an available long-arm statute) whether or not the contract called for payments in Florida.

The litigation in this case grew out of that relationship, and tested its requirements—making Florida the most appropriate place to handle it. The obligation to defend there was not shown to have hindered Mr. Rudzewicz' defense to any extent. In contrast, it was significantly beneficial not only to Burger King—whose overriding goal of uniformity is enhanced by the resolution of disputes, and thus the legal evolution of its business

practices, in a single jurisdiction; but also to the State of Florida, which is interested not only in the application of its own law, but in protecting both the business expectations and the business reputation, derived from its good name and trademarks, of a Florida corporation. Since these interests were created by the franchisees' deliberate and voluntary choice of associating themselves with the forum, there was no constitutional infirmity in its exercise of jurisdiction in this case.

Finally, we argue that Mr. Rudzewicz' post-trial compromise of the trademark claims was a waiver of any challenge to the jurisdiction of the district court.

ARGUMENT

I. This Court Has Jurisdiction Under 28 U.S.C. §1254(2) Because the Circuit Court Held That §48.193(1)(g) of the Florida Statutes—Which Confers Long-Arm Jurisdiction Upon One Who Breaches a Contract in Florida by Failing to Perform Acts Required by the Contract to Be Performed in Florida—Is Unconstitutional As Applied.

We have briefed this question in our Jurisdictional Statement (pp. 8-12), and will not repeat that discussion. The jurisdictional statute in this case, unlike those at issue in several recent decisions of this Court, does not simply codify constitutional limits, and thus by its own terms render all questions of statutory construction irrelevant.[22] Instead, §48.193(1)(g) broadly extends to "any cause of action arising from . . . [b]reaches of contract in this

22. *See, e.g., Calder v. Jones,* ..... U.S. ....., 104 S. Ct. 1482, 79 L. Ed.2d 804, 810 n.5 (1984) (hereinafter *"Calder"*); *Kulko v. Superior Court of California in and for the City and County of San Francisco,* 436 U.S. 84, 90 n.4 (1978) (hereinafter *"Kulko"*); *May v. Anderson,* 345 U.S. 528 (1953).

state," which in turn are broadly defined by reference to any "acts required by the contract to be performed in this state." The federal courts are *Erie*-bound[23] to follow the Florida courts' construction of this expansive language, and eleven Florida decisions, representing all five of the appellate districts, have flatly held that the contractual failure to make payments due in Florida is alone sufficient to confer jurisdiction over a cause of action growing out of the contract.[24]

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23. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

24. *Chen v. Watter*, 421 So.2d 771, 772 (Fla. 4th DCA 1982) (per curiam); *Carroll Associates, Inc. v. Video Applications, Inc.*, 421 So.2d 3 (Fla. 5th DCA 1982) (per curiam); *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc.*, 415 So.2d 114, 115 n.3 (Fla. 3rd DCA 1982); *Guritz v. American Motivate, Inc.*, 386 So.2d 60, 61-62 (Fla. 2nd DCA 1980); *Wilks v. Swift and Co.*, 382 So.2d 1364 (Fla. 1st DCA 1980); *Professional Patient Transportation, Inc. v. Fink*, 365 So.2d 209, 210 (Fla. 3rd DCA 1978); *Cosmopolitan Health Spa, Inc. v. Health Industries, Inc.*, 362 So.2d 367, 368-69 (Fla. 4th DCA 1978); *First National Bank of Kissimmee v. Dunham*, 342 So.2d 1021 (Fla. 4th DCA 1977); *Madax International Corp. v. Delcher Intercontinental Moving Services, Inc.*, 342 So.2d 1082, 1084 (Fla. 2nd DCA 1977); *Feldman v. Southeast Bank of Dadeland*, 323 So.2d 628, 629 (Fla. 3rd DCA) (per curiam), *cert. denied*, 333 So.2d 41 (Fla. 1976). *See Thompson v. King*, 523 F. Supp. 180, 184 (M.D. Fla. 1981) (Florida law).

In contrast, isolated panels in two of the districts have invented a legislative command that the statute be construed according to constitutional limits. *Scordilis v. Drobnicki*, 443 So.2d 411, 412-14 (Fla. 4th DCA 1984); *Lakewood Pipe of Texas, Inc. v. Rubaii*, 379 So.2d 475 (Fla. 2nd DCA), *appeal dismissed*, 383 So.2d 120 (Fla. 1980); *Osborn v. University Society, Inc.*, 378 So.2d 873, 874 (Fla. 2nd DCA 1979). *See Poston v. American President Lines, Ltd.*, 452 F. Supp. 568 (S.D. Fla. 1978) (Florida law). These decisions are not only aberrational but indefensible. Of course the statute should be construed if possible to avoid a constitutional infirmity; and if this statutory language were at all unspecific—like a "doing business" statute—there might be room for such a construction. But this statute says what it says, and any imputation of qualifying language "would be strained." *Engineered Storage Systems, Inc. v. National Partitions & Interiors, Inc., supra*, 415 So.2d at 115 n.3. *See Grendel's Den, Inc. v. Goodwin*, 662 F.2d 102, 105 (1st Cir. 1981) (en banc), *aff'd*, 459 U.S. 116 (1982); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 492 (5th Cir. 1974). Thus, we rely not only upon the overwhelming majority of Florida decisions interpreting this statute, but on the obvious correctness of those decision.

Moreover, the circuit court's ability to construe this statute was limited in this case not only by *Erie*, but also by the defendant, because Mr. "Rudzewicz concede[d] that his activities fall within the reach of the Florida long-arm statute . . ." (J.A. 171).[25] For this reason, if "the opinion below does not purport to determine the constitutionality of the . . . jurisdictional statute,"[26] this silence is attributable to the fact that the process of statutory construction (the first step in judging constitutionality) was in effect *already complete* by the time the case reached the circuit court. The only remaining question was the second step—the determination of constitutional limits. Thus, when the circuit court held that "[j]urisdic-

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25. Given the general language of Mr. Rudzewicz' motion and memoranda in the trial court (J.A. 136-37; R. 116-21, 195-200), it is difficult to tell if he made the same concession there. At the least, his motion was sufficient to place the constitutionality of the statute at issue. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 249 (1829). *Cf. Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410, 415-16 (1886); *Furman v. Nichol*, 75 U.S. (8 Wall.) 44, 55-56 (1868). And the trial court's order on the motion necessarily implicated that question. *See Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590, 599 (1953); *New York ex rel. Bryant v. Zimmerman, supra*, 278 U.S. at 67; *Willson v. Black Bird Creek Marsh Co., supra*, 27 U.S. (2 Pet.) at 249. In any event, by the time of appeal Mr. Rudzewicz was willing to concede the reach of the statute, and the circuit court addressed the constitutional question without reference to the specific claim raised at trial. *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached it. That is sufficient under our practice"), *citing Raley v. Ohio*, 360 U.S. 423, 436 (1959).

26. *Calder*, 79 L. Ed.2d at 811 n.7. *See Silkwood v. Kerr-McGee Corp.*, ... U.S. ....., 104 S. Ct. ....., 74 L. Ed.2d 443, 451-52 (1984) ("[W]e have consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute . . . . [The appellate court] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs"); *Kulko*, 436 U.S. at 90 n.4 ("The opinion below does not purport to determine the constitutionality of the California jurisdictional statute").

tion under these circumstances would offend the fundamental fairness which is the touchstone of due process" (J.A. 183), it *necessarily* held the Florida statute unconstitutional as applied.

That conclusion is inherent in the construction of this statute embraced by the clear majority of Florida courts; in the obvious correctness of that construction; and in the posture in which this issue came to the circuit court. And that conclusion does not depend upon the circuit court's willingness to acknowledge what it was doing by incanting "some abracadabra."[27] Since the circuit court necessarily declared §48.193(1)(g) unconstitutional as applied, this Court has jurisdiction under 28 U.S.C. §1254(2). *See* Jurisdictional Statement, p. 11 n.16.

II. The Circuit Court Erred in Holding the Statute Unconstitutional As Applied, Because Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum; Was Called to Answer in a Florida Court for Conduct Growing Out of That Relationship; and Was Not Unfairly Burdened by the Defense.

A. *The Exercise of Jurisdiction in Florida Did Not Not Offend Due Process.*

The question is whether Mr. Rudzewicz had "certain minimum contacts with [Florida] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[28] That stan-

27. *Flournoy v. Wiener*, 321 U.S. 253, 264-65 (1944) (Frankfurter, J., dissenting). *See Franchise Tax Board of California v. United States Postal Service*, ... U.S. ....., 104 S. Ct. ....., 81 L. Ed.2d 446, 450 n.7 (1984) (and cases cited); *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982).

28. *International Shoe Co. v. State of Washington, Office of Employment Compensation and Placement*, 326 U.S. 310, 316 (1945) (hereinafter *"International Shoe"*), *citing Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

dard is satisfied if the defendant's contacts "make it reasonable, in the context of our federal system, to require [him] to defend . . . ."[29] The constituents of reasonableness must be discovered in the relationship among the defendant, the forum, and the litigation.[30]

We will explore that relationship through three criteria, which conjoin to define the most restrictive view of personal jurisdiction inherent in this Court's modern decisions on the issue: 1) the extent to which Mr. Rudzewicz purposely availed himself of the privilege of conducting activities within the forum state;[31] 2) the extent to which Burger King's lawsuit was related to that purposeful activity;[32] and 3) despite the satisfaction of both criteria, the extent to which subjecting Mr. Rudzewicz to the jurisdiction of a Florida court might otherwise be considered unfair.[33]

1. *Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum.* This Court noted in *World-Wide Volkswagen*, 444 U.S. at 297, that

29. *International Shoe*, 326 U.S. at 317, *cited in World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (hereinafter *"World-Wide Volkswagen"*). *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952).

30. *Calder*, 79 L. Ed.2d at 811; *Keeton v. Hustler Magazine*, ... U.S. ....., 104 S. Ct. ....., 79 L. Ed.2d 790, 798 (1984) (hereinafter *"Keeton"*); *Rush v. Savchuk*, 444 U.S. 320, 327 (1980) (hereinafter *"Rush v. Savchuk"*); *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977) (hereinafter *"Schaffer"*).

31. *See Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (hereinafter *"Hanson"*).

32. *See Rush v. Savchuk*, 444 U.S. at 328-29.

33. *See Kulko*, 436 U.S. at 92; *International Shoe*, 326 U.S. at 316. On these three criteria, see generally Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 99 (1983) (hereinafter "Lilly"); Brewer, *Jurisdiction in Single Contract Cases*, 6 U. Ark. Little Rock L. J. 1, 11-12 (1983); Note, *Long-arm Jurisdiction in Commercial Litigation: When is a Contract a Contact?*, 61 B. U. L. Rev. 375, 382-83 (1981) (hereinafter "Note").

the "orderly administration of the laws" prescribed in *International Shoe*, 326 U.S. at 319, embraces "a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Thus it is important to determine whether the defendant "engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable." *Rush v. Savchuk*, 444 U.S. at 329. A defendant who acts voluntarily "has clear notice that [he] is subject to suit [in the forum], and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing [his] connection with the State."[34]

Thus, the question is not simply whether the defendant should have foreseen that his conduct would have some impact in the forum, because the defendant may be unable to control entirely even the foreseeable consequences of his acts.[35] The question instead is whether

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34. *World-Wide Volkswagen*, 444 U.S. at 319. *See* Lilly, 69 Va. L. Rev. at 87, 105, 107-08; Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 76, 91-92, 96, 112 (1980) (hereinafter "Brilmayer").

35. *See Calder*, 79 L. Ed.2d at 812; *World-Wide Volkswagen*, 444 U.S. at 295-96. For example, in *Hanson v. Denckla*, 357 U.S. at 252-53, the decedent's execution in Florida of a power of appointment of the trust assets did not confer jurisdiction over the Delaware trustee, because "the record discloses no instance in which the *trustee* performed any acts in Florida," and the trustee was not bound by the "unilateral activity" of others. In *Kulko*, 436 U.S. at 93, 97, the husband had no control over the wife's unilateral decision to move to California, and thus did not submit to its jurisdiction. In *Rush v. Savchuk*, 444 U.S. at 328-29, the defendant driver had no idea when he contracted for coverage by State Farm that he might be subject to suit (on the basis of State Farm's duty to defend him) wherever State Farm does business—and he had no control over State Farm's ubiquity anyway. Nor would he have done any

(Continued on following page)

the defendant should reasonably have foreseen that he would be called to answer for his conduct in the forum,[36] because, through his own purposeful acts, he linked his interests with the forum. By those voluntary acts, he has effectively consented to jurisdiction.[37]

Thus in *McGee*, 355 U.S. at 221-22, the insurer's assignee was an out-of-state company, but had mailed a

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Footnote continued—

better with any other insurer which does business in more than one jurisdiction. And in *World-Wide Volkswagen*, 444 U.S. at 295-98, it was "fortuitous," from the perspective of the retailer and its wholesale distributor, that the automobile which they sold within their restricted market area suffered an accident two thousand miles away. *See also Helicopteros Nationales De Colombia S.A. v. Hall*, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed.2d 404, 412 (1984) (hereinafter *"Helicopteros"*) (acceptance of check drawn on Texas bank a fortuitous contact; "unilateral activity of another" "not an appropriate consideration").

36. *World-Wide Volkswagen*, 444 U.S. at 297. *See Rush v. Savchuk*, 444 U.S. at 328-29; *Schaffer*, 433 U.S. at 216.

37. From this perspective, it is no surprise that absent some evidence of fraud or undue influence, the defendant may bind himself to the jurisdiction through a contractual forum clause—because that is a voluntary, avoidable act. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *See Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694, 704-05 (1982) (hereinafter *"Insurance Corp. of Ireland"*); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972) (hereinafter *"Overmyer"*); *National Equipment Rental v. Szukhent*, 375 U.S. 311, 315-16 (1964); *Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495 (1956); *Travelers Health Association v. Commonwealth of Virginia at the Relation of the State Corporation Commission*, 339 U.S. 643, 648 (1949) (hereinafter *"Travelers Health"*); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506 (1947). *See also* Brilmayer, 1980 Sup. Ct. Rev. at 93. Of course the absence of a forum clause is not "controlling" of the jurisdictional question. *Schaffer*, 433 U.S. at 227 & n.6 (Brennan, J., dissenting). In this case, Burger King chose to conform its contract to the language of the long-arm statute, by calling for payments to be made in Florida. In contrast, §48.193 does not expressly confer long-arm jurisdiction on the basis of a forum clause, and provides for service of process only upon persons subject to Florida jurisdiction "as provided in this section." §48.193(2). The franchise agreement provides that suits are not *required* to be filed in Florida (J.A. 72), thus permitting either party to have sought redress in Michigan, while cautioning both parties to anticipate defending in Florida.

reinsurance certificate to the insured in the forum state, thus soliciting his business.[38] In *Keeton*, 79 L. Ed.2d at 797, the defendant publisher disseminated its magazine nationwide on a regular monthly basis, and thus its publication of a libelous issue in the forum state "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous." And in *Calder*, 79 L. Ed.2d at 812-13, the defendant editor and reporter in a libel suit were not charged "with mere untargeted negligence," but with "intentional, and allegedly tortious, actions . . . expressly aimed at California"—and thus they "knowingly cause[d] the injury in California."[39]

The dominant theme of these cases is that the defendant had control over the consequences of his actions. As this Court noted in *Kulko*, 436 U.S. at 97, 100, 101, a defendant is amenable to jurisdiction if he "has sought a commercial benefit from solicitation of business from a resident of [the forum]"; if he derives a "personal or commercial benefit" from the contact; or if he displays an "intent to obtain or expectancy of receiving a corresponding benefit in the State . . . ."[40]

This case meets that standard. The franchisees acted affirmatively and unilaterally when they sought to create

38. *See* Lilly, 69 Va. L. Rev. at 90 n.20; Note, 61 B. U. L. Rev. at 398.

39. *See also Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623, 627-28 (1935) (defendant's office in forum state is significant because he voluntarily established it, thus effectively consenting to jurisdiction).

40. Defendants consent to jurisdiction who "actively [pursue] commercial transactions throughout the various States," *Helicopteros*, 80 L. Ed.2d at 416 (Brennan, J., dissenting)—who "knowingly reach out from [their domiciles], knowingly causing effects in other States and receiving economic advantages both from the ability to cause such effects themselves and from the activities [of others] in other States"—who "intentionally became part of an interstate economic network . . . for pecuniary gain." *World-Wide Volkswagen*, 444 U.S. at 315 (Marshall, J., with Blackman, J., dissenting).

a long-term relationship with a national organization based in Miami—binding themselves to make payments to Miami and to be governed by Florida law. They could have bought or constructed their own restaurant, and sold hamburgers in a purely-intrastate environment. They chose instead to solicit the support and economies of an interstate network—and the laws of another jurisdiction. This Court has repeatedly acknowledged that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase."[41] That result may be inappropriate to the extent that an intrastate enterprise has no choice but to involve itself in certain interstate activities—but that is not this case. In this case, rejecting local options, the franchisees were eager entrants into a 20-year relationship with a nationwide network of 3,000 identical restaurants, all subject to stringent controls dictated by their franchisor.

In this context, the circuit court's distinction between buyers and sellers (J.A. 176-77), and its analogy to mail-order consumers (J.A. 177), are inappropriate. These were not passive consumers in a 20-minute retail transaction; they were active businessmen, who voluntarily entered into a 20-year commercial relationship, a deeply interdependent relationship, with an out-of-state corporation. In *Kulko*, this Court acknowledged a fundamental distinction between transactions of a personal and commercial nature. 436 U.S. at 97, *cited in World-Wide Volkswagen*, 444 U.S. at 316-17 (Marshall, J., with Blackman, J., dissenting).

41. *Hanson v. Denckla*, 357 U.S. at 250-51, *citing McGee*, 355 U.S. at 222-23. *Accord, World-Wide Volkswagen*, 444 U.S. at 292-93; *Kulko*, 436 U.S. at 101. *See Helicopteros*, 80 L. Ed.2d at 416-17 (Brennan, J., dissenting); *World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting); *Hanson*, 357 U.S. at 260 (Black, J., with Burton and Brennan, J.J., dissenting). *Cf. Postal Telegraph Co. v. Richmond*, 249 U.S. 252, 259-60 (1919) ("Even interstate business must pay its way"), *quoted in* Brilmayer, 1980 Sup. Ct. Rev. at 87 n.55.

And this Court has also emphasized the distinction between "an isolated occurrence," *World-Wide Volkswagen*, 444 U.S. at 297, and the creation of "continuing obligations," *Travelers Health*, 339 U.S. 643, 648 (1949).[42]

The circuit court's opinion suggests that the involvement of Burger King's Miami headquarters, as an integral part of the franchise arrangement, somehow came as an "unfair surprise" (J.A. 177). But even the first offering circular advised that Burger King's "business activities . . . are conducted" in Miami (J.A. 11), and in great detail outlined the extent to which Burger King would demand and enforce conformity with its national standards. The preliminary agreement invokes Burger King's "specifications, criteria and performance standards" (J.A. 37). And both the lease and franchise agreements are primarily regulatory mechanisms, which specify in great detail the extent to which Burger King will assure compliance with requirements consistent with a national image. All of the written documents—and indeed the entire course of dealing between the parties—should reasonably have advised the franchisees of the central involvement of the Miami office.

First, three separate contracts—the purchase agreement with Burger King's Davmor division (X. W, pp. 3-8; Tr. 371, 378); the lease agreement (J.A. 118); and the franchise agreement (J.A. 72), all call for the application of Florida law. This is important not simply because it signals Florida's interest in the case, but because it notified Mr.

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42. *See International Shoe*, 326 U.S. at 320 (contacts "systematic and continuous"). *Compare Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.*, 260 U.S. 516 (1923), *cited in International Shoe*, 326 U.S. at 318 ("single or occasional acts" insufficient). In our Jurisdictional Statement (p. 25. n.37), we cited a few lower-court decisions distinguishing between consumer transactions and commercial transactions. We also cited authority rejecting any wooden distinction between buyers and sellers (p. 25 n.41). *See also* Casad, *Long-Arm and Convenient Forum*, 20 Kan. L. Rev. 1, 27 (1971).

Rudzewicz of that interest—an interest foreseeably created by his voluntary decision to enter into these contracts. As we noted in the Jurisdictional Statement (p. 22 n.31), these contracts would be governed by Florida law whether they said so or not. But as this Court has emphasized, the choice-of-law question and the jurisdictional question are two different things.[43] The point here is that the franchisees voluntarily contracted for the application of Florida law. That was a form of consent to jurisdiction in Florida. By expressly invoking "the benefits and protection of the laws of that state," "including the right to resort to the courts for the enforcement of its rights," the franchisees effectively consented to subject themselves to those same judicial processes. *International Shoe*, 326 U.S. at 319.[44]

Second, the lease agreement calls for arbitration under certain circumstances, and specifically provides that such arbitration will be held in Miami. This Court has acknowledged authority that "consent [to jurisdiction is] implicit in agreements to arbitrate."[45] At the very least,

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43. *See Keeton*, 79 L. Ed.2d at 800; *Kulko*, 436 U.S. at 98; *Schaffer*, 433 U.S. at 215; *Hanson*, 357 U.S. at 254. *See also* Brilmayer, 1980 Sup. Ct. Rev. at 95. In this context, we should anticipate Mr. Rudzewicz' argument that Michigan law, specifically the Michigan Franchise Investment Act (*see* J.A. 171), should apply in this case. Even apart from the question of how Mr. Rudzewicz plans to get around his contractual obligations to conform with Florida law, any such contention confuses the substantive issue with the jurisdictional issue. The point in this context is that the contracts called for the application of Florida law, and thus Mr. Rudzewicz purposely created a contact with the forum when he signed them.

44. *See* Note, 61 B. U. L. Rev. at 397. We cite a few lower-court decisions to the same effect at p. 22 n.32 of the Jurisdictional Statement.

45. *Insurance Corp. of Ireland*, 456 U.S. at 704, *citing Victory Transport, Inc. v. Comisaria General De Abastecimientos y Transportes*, 336 F.2d 354, 363 (2nd Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), *and* 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶4.02[3] at 4-47 n.22 (1982). At least one court has also

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this clause was further evidence that decisionmaking is centered in Miami.

Third, as we have noted, these contracts contain numerous references to Florida in a variety of contexts. They declare that the agreements were made in Florida, they identify Burger King as a Florida corporation, they identify Burger King's principal place of business in Florida, they require that notices be sent to Florida, they require that a variety of payments be sent to Florida. These provisions conjoin to put the franchisees on notice that they were dealing, and would be dealing, with a corporation centered in Florida.

The circuit court suggested that a "characteristic disparity of bargaining power" precluded Mr. Rudzewicz from removing any of the contractual provisions which gave him obvious notice of Florida's interest in the contract. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 186 (1972). Since Mr. Rudzewicz never asked to remove any of these provisions, there is no evidence of record to support that factual assertion. To the contrary, as we have noted, Mr. Rudzewicz did negotiate a small reduction in rent.[46] Perhaps Burger King would not have given up the quality controls

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Footnote continued—

discovered such consent in a contractual provision, like the one in this case (X. W, p. 3; Tr. 369, 378), that the freight will be F.O.B. shipping point—meaning that the risk of loss shifts to the buyer at the shipping point—because the forum state's fire and theft protection thus becomes available to the purchaser. *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583 (2nd Cir. 1965). *But see Vencedor Mfg. Co. v. Gougler Industries, Inc.*, 557 F.2d 886, 891-92 (1st Cir. 1977); Note, *supra*, 61 B. U. L. Rev. 375, 394-96.

46. At the very least, the franchisees were active participants in the give-and-take concerning the terms of these contracts. *See* Jurisdictional Statement, p. 26 n.42. As a general proposition, although most franchisors have greater economic power than their franchisees, the relationship is symbiotic, producing results which neither the franchisee nor the franchisor could achieve alone. H. Brown, *Franchising Realities and Remedies* 12 (1978).

and supervision which are so pervasive in these contracts,[47] but that does not mean that the contract was unconscionable, one-sided, or somehow involuntary. The franchisees received a great deal in return for their participation in a national system. These contracts manifestly advised the franchisees of the interstate connection which they were voluntarily making, and there is nothing in their formation which converts their voluntary acts into involuntary acts.[48]

Fourth, the course of dealing between the parties demonstrated that the Miami office was calling the shots. The circuit court's opinion reflects the importance of this

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47. *See* H. Brown, *Franchising Realities and Remedies* 18 (1978) ("The franchisor's refusal [to alter the contract] is not mere stubbornness. Rather, he has great economic interest in the very provisions the franchisee finds most objectionable"). Indeed, since the franchise agreement also contains a license for use of Burger King's tradenames and marks, Burger King *could not* have given up control over the quality and public image of the franchise without risking abondonment of its licenses. *See Haymaker Sports, Inc. v. Turian*, 581 F.2d 257, 261 (C.C. Pa. 1978); *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.*, 486 F.2d 114, 124-25 (5th Cir. 1973); *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2nd Cir. 1959); *Robinson Co. v. Plastics Research and Development Corp.*, 264 F. Supp. 852, 863 (W.D. Ark. 1967).

48. *See Ungar v. Dunkin Donuts of America, Inc., supra* note 9, 531 F.2d at 1223 ("We do not imagine that many persons are, in any meaningful sense, forced to enter into franchise agreements"). As we have noted, the circuit court is preoccupied in its opinion with the extent to which the franchisees were misled about the amount of rent which they would be required to pay, and with the implicit coercion that they sign the contracts or suffer a substantial financial loss (on the already-purchased equipment) unless they did so. The trial court found no such coercion, and with good reason. Moreover, as we have noted, note 43, *supra*, it would be a mistake to confuse the substantive issues with the jurisdictional issue. In *Kulko*, 436 U.S. at 96, this Court reversed the lower court because its opinion "confuses the question of appellant's liability with that of the proper forum in which to determine that liability." The franchisees knew well before they contracted for purchase of the equipment that they were entering into a system of national controls emanating from Miami. They received copies of the offering circular, the lease agreement, and the franchise agreement six months before they signed the agreements, and three months before they contracted to purchase equipment (X. 21; Tr. 167, 171). Thus, the question of whether they felt pressured into signing the contract at some later time is totally irrelevant to the jurisdictional question.

point, in its strained attempt to demonstrate Mr. Rudzewicz' reasonable belief "that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters," and that "the distant corporate headquarters . . . insulated itself from direct dealings with him . . ." (J.A. 179, 180). As we have noted, the record proves otherwise. There was a continual course of written and oral communications between the franchisees and the Miami office, concerning both formation of the contract and the attempt to save the franchise. Even before the franchise agreement was signed, co-franchisee MacShara had attended training courses in Miami, designed to conform his behavior to the national standard. As this Court said in *Rush v. Savchuk*, 444 U.S. at 332, the relationship between Mr. Rudzewicz and Mr. MacShara "may be significant in evaluating their ties to the forum." *Cf. Hanson*, 357 U.S. at 263 (Douglas, J., dissenting). As we have noted, contrary to the circuit court's conclusion (J.A. 182 n.14), the co-franchisees in this case not only had a formal partnership, but in addition, under Florida law, were partners by virtue of their rights and obligations under the franchise agreement.[49] The important point, however, is not simply that Mr. MacShara's physical contact with the forum should be imputed to Mr. Rudzewicz, but that Mr. Rudzewicz' knowledge of the contact was also knowledge of the interest and activity of the Miami office.

That knowledge was reenforced by the evidence that any changes in the terms of the franchise and lease agreements were required to be approved by the Miami office, since the Michigan district office had no decisionmaking authority. *See* note 11, *supra*. And when the franchise got into trouble, that impression was further reenforced

49. *See Webster v. Clark*, 34 Fla. 637, 16 So. 601 (1894); *F.J. Dubos & Co. v. Hoover, Jones & Bowden*, 25 Fla. 720, 6 So. 788 (1889); *Schilpp v. Schilpp*, 380 So.2d 573 (Fla. 1st DCA 1980).

by the constant stream of written correspondence between the Miami office and the franchisees, *see* note 11, *supra*. And as we have noted, p. 19, *supra*, it was accompanied by a constant series of telephone conversations between the franchisees and at least three different officials in the Miami office, in an attempt to work out the financial problem. The unmistakable message is that the Miami office set policy, brokered deviation from policy, and enforced the termination—all in the context of its zealous protection of the national standards so essential to the successful franchise operation. The circuit court's opinion not only fails entirely to state the evidence in the light most favorable to the trial court's finding of jurisdiction, but ignores the central character of the business relationship in this case.

Fifth, the franchisees should have known that their conduct was causing economic injury in Florida. As we have acknowledged, this is not the dispositive question of foreseeability, but it is relevant to the franchisees' reasonable anticipation that they might be called to answer for their conduct in a Florida court.[50] As Justice Brennan wrote in *World-Wide Volkswagen*, 444 U.S. at 311 (Brennan, J., dissenting): "People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared

50. *Calder*, 79 L. Ed.2d at 812 ("California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioner is therefore proper in California based on the 'effects' of their Florida conduct in California"); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943) (place of contract less important than "great weight" accorded the "consequences" of the contractual obligation), *cited in Travelers Health*, 339 U.S. at 648. See the lower-court decisions cited at p. 23 nn.33, 34 of the Jurisdictional Statement. *Cf. Schaffer*, 433 U.S. at 226 (Brennan, J., dissenting). *See also* von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1167 (1966).

to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed."

The franchisees should have known that their failure to make payments to Miami would cause economic harm;[51] and they should have known that their continued and wrongful use of Burger King's tradenames and marks after termination of the franchise would impact most directly at the source of Burger King's national reputation —its principal place of business. As we have noted, Burger King's complaint charged trademark infringement not only under federal law, but also under Florida's common law (J.A. 135).[52] Section 48.193(1)(b), Fla. Stat. (1983), confers long-arm jurisdiction over one who commits a tortious act in Florida. That includes conduct out of state which causes injury in Florida.[53] Our contention is not that tort cases should be allowable on the basis of more attenuated contacts than contract cases.[54] We merely note

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51. An act of omission may cause just as much damage as an act of commission. *See Brilmayer*, 1980 Sup. Ct. Rev. at 90.

52. *See Miami Bottled Gas, Inc. v. Dri-Gas Corp.*, 183 So. 828, 829-30 (1938); *Crown Central Petroleum v. Standard Oil Co.*, 135 So.2d 26, 28 (Fla. 1st DCA 1961), *cert. denied*, 142 So.2d 731 (Fla. 1962).

53. *See Bangor Punta Operations, Inc. v. Universal Marine Co., Ltd.*, 543 F.2d 1107, 1109 (5th Cir. 1976) (Florida law); *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1211 (5th Cir. 1975) (Florida law); *Carida v. Holy Cross Hospital, Inc.*, 424 So.2d 849, 851 (Fla. 4th DCA 1983). *See generally Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1275 (1983); *Simon v. United States*, 644 F.2d 490 (5th Cir. 1981); *Thorington v. Cash*, 494 F.2d 582 (5th Cir. 1974); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), *cited in World-Wide Volkswagen*, 444 U.S. at 298, *and Schaffer*, 433 U.S. at 223, 226 (Brennan, J., dissenting). As the *Bangor* case makes clear, trademark infringement is a species of tort. *See* Jurisdictional Statement, p. 28, n.49.

54. *See* Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227, 232 (1967).

that we have a tortious act in this case as well as a breach of contract—and that both caused foreseeable consequences in Miami.

On the basis of the foregoing, we think the conclusion is inescapable that Mr. Rudzewicz purposely availed himself of the benefits and protections of the forum. He solicited this contract. He entered voluntarily into an interstate relationship. He knew from the start that he was trading a measure of autonomy for the shelter of a franchise relationship. He knew that the terms and conditions of that relationship were defined and enforced, as a matter of national policy, from Miami. He learned that firsthand in his dealings with Burger King. He saw the tangible evidence in the language of his contracts. He effectively consented to the jurisdiction of the Florida courts, in his contract calling for both arbitration in Miami and for the application of Florida law. And he engaged in conduct which he knew would have its primary effect in Miami. It should have come as no surprise that he was called to answer for his conduct in a Florida court.

2. *Burger King's Cause of Action Arose Out of Mr. Rudzewicz' Contacts with the Forum.* This is a "specific jurisdiction" case—in which jurisdiction is based not on a general presence in the forum, but on specific contacts out of which the cause of action arose.[55] When the contact in question is a single business or contractual relationship, and step 1 is satisfied—that is, the defendant is held to have availed himself in making the contract of the benefits and protections of the forum—then a claim for breach of that contract would necessarily arise out of the contact; and similarly, a tort action arising from the same contractual relationship would also meet the "con-

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55. *Helicopteros*, 80 L. Ed.2d at 411 n.8, *citing* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1144-64 (1966).

nexity" requirement.[56] That requirement is clearly satisfied in this case. Florida's jurisdiction was invoked solely on the basis of the contractual relationship formed between Burger King and the franchisees. The cause of action for breach of contract and trademark infringement necessarily grew out of that relationship. The elements of that cause of action are identical to the jurisdictional allegations—that is, that the defendants had caused injury in the context of that very relationship which constituted the jurisdictional contact.[57] Indeed, the two specific causes of action—breach of contract for payment of money, and trademark infringement, are both central contacts for jurisdictional purposes. The "connexity" requirement is satisfied.[58]

3. *The Florida Court's Assertion of Jurisdiction over Mr. Rudzewicz was not Otherwise Unfair.* None of this Court's decisions on the question of personal jurisdiction undertake an explicit balancing of the burdens of litigation for the defendant against the interests of the plaintiff and the forum. Instead, they suggest that where, as here, a defendant's purposeful conduct has an obvious adverse impact upon the plaintiff's activities in the forum, *see, e.g., Calder*, 79 L. Ed.2d 804, and where that impact is

56. *See In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 222-23, 231 (6th Cir. 1972), *cited in* Brewer, *Jurisdiction in Single Contract Cases*, U. Ark. Little Rock L. J. 1, 14 (1983). The Florida statute codifies this requirement, creating long-arm jurisdiction over any action "arising from" the specified contacts. §48.193(1), Fla. Stat. (1983).

57. *See* Brilmayer, 1980 Sup. Ct. Rev. at 82, 112.

58. *See Calder*, 79 L. Ed.2d at 811; *International Shoe*, 326 U.S. at 320. *Cf. Keeton*, 79 L. Ed.2d at 801. Some lower-court decisions on the point are cited at p. 24 n.36 of the Jurisdictional Statement. *Compare Rush v. Savchuk*, 444 U.S. at 329, discussed in Brilmayer, 1980 Sup. Ct. Rev. at 100; *Schaffer*, 433 U.S. at 213; *Rosenberg Bros. & Co., Inc. v. Curtis Brown Co.*, 260 U.S. 516 (1923), discussed in *Helicopteros*, 80 L. Ed.2d at 413, and 80 L. Ed.2d at 416 n.1 (Brennan, J., dissenting). *Cf. World-Wide Volkswagen*, 444 U.S. 286, discussed in Brilmayer, 1980 Sup. Ct. Rev. at 88.

in no sense "random, isolated, or fortuitous," *Keeton*, 79 L. Ed.2d at 797, the Court will consider any burdens of litigation to be burdens knowingly incurred. In short, a defendant should be hard-pressed to justify escaping any inconvenience occasioned by his own purposeful behavior, *see* Lilly, 69 Va. L. Rev. at 107, especially since there are less drastic means of redressing practical inconvenience, like a motion for change of venue, which in this case Mr. Rudzewicz has chosen not to pursue. *See* note 62, *infra*. Only when the defendant has created no purposeful links to the forum, therefore, does the due-process clause protect him "against inconvenient litigation." *World-Wide Volkswagen*, 444 U.S. at 291-92.

We submit, however, that even if this Court were to take the unprecedented step of directly balancing the burdens and benefits to both sides, that process would independently support a finding of jurisdiction in this case. First, Florida has a clear interest in protecting the business expectations and reputation of its residents. That interest is codified in the expansive language of the jurisdictional statutes in question, which extend jurisdiction to any contract in which performance is required in Florida, and to any tortious conduct causing injury in Florida.[59] It is especially strong regarding the infringement claims, because they implicate the state's regulatory interest in enforcing its own common-law protection of trademarks and names. This Court has suggested that although the forum's interest should not be dispositive in the absence of evidence that the defendant acted unilaterally to create those con-

59. The statutes reflect Florida's desire to provide a convenient forum for the litigation of those questions. *See Mullane v. Central Hanover Trust Co.*, 329 U.S. 306, 313 (1950), *cited in Schaffer*, 433 U.S. at 223-24 (Brennan, J., dissenting). *See also World-Wide Volkswagen*, 444 U.S. at 302 (Brennan, J., dissenting). *Compare Schaffer*, 433 U.S. at 214-15 (asserted state interest not reasonably reflected in language of long-arm statute).

tacts which gave rise to the forum's interest, the extent of that interest is nevertheless a factor in assessing the fairness of the forum's exercise of jurisdiction.[60]

Thus in *Keeton*, 79 L. Ed.2d at 798-800, even though the forum was not the plaintiff's residence or the principal place of injury, this Court placed heavy reliance on the forum's interest even in redressing "the injury that in-state libel causes within New Hampshire to a nonresident"; and also in cooperating with other states in enforcing the common "single publication" rule requiring an award of all damages caused in all states. Thus, this Court concluded, these two interests "demonstrate the propriety of requiring the respondent to answer to a multistate libel action in New Hampshire."[61]

Our case, of course, is far stronger. By analogy to *Keeton*, perhaps Burger King might have brought this

60. *See Keeton*, 79 L. Ed.2d at 798; *World-Wide Volkswagen*, 444 U.S. at 292, 294; *Kulko*, 436 U.S. at 92, 98, 100; *Schaffer*, 433 U.S. at 208, 215; *McGee*, 355 U.S. at 223 (forum has "manifest interest in providing effective means of redress for its residents"). *Cf. Schaffer*, 433 U.S. at 223 (Brennan, J., dissenting); *Hanson*, 357 U.S. at 259 (Black, J., with Burton and Brennan, J.J., dissenting). *See generally* Brilmayer, 1980 Sup. Ct. Rev. at 89, 105-07. Some lower court decisions on the point are cited at p. 26 nn.45-46 of the Jurisdictional Statement.

61. *Keeton* gave no explicit consideration to the limits of New Hampshire's "sovereign" powers in the interstate system. In *Insurance Corp. of Ireland*, 456 U.S. at 501 n.10, this Court declared that restrictions on state sovereignty are a product solely of individual rights—that there is no inherent constitutional limit on state sovereignty, or else questions of personal jurisdiction could never be waived. *Accord, Hanson*, 357 U.S. at 251. *See Keeton*, 79 L. Ed.2d at 802 (Brennan, J., dissenting). *See generally* Brilmayer, 1980 Sup. Ct. Rev. at 85. In *World-Wide Volkswagen*, however, 444 U.S. at 291-92, the Court appeared to counsel independent consideration of the "limits imposed on [the states] by their status of coequal sovereigns in a federal system." *But see id.* at 294. If New Hampshire's sovereign status in *Keeton* was sufficient to encompass its interest in the damage caused to a New York resident by a California publisher, then Florida's sovereign status easily embraces the interests of a Florida corporation. *See* note 62, *infra*.

action in any state in which it does business, on the ground that the franchisees' asserted trademark infringement diminished to some marginal extent Burger King's goodwill and reputation in that state. Instead, Burger King brought the action where it resides and suffered the principal harm, in the single jurisdiction with the greatest interest in redressing that harm.[62]

Second, Florida has an interest in the application of its own law. We recognize that the Michigan courts are capable of looking up Florida law. Nevertheless, the Florida courts are more "at home" with Florida law.[63] And this interest is particularly strong in light of Mr. Rudzewicz' claim that Michigan law, and not Florida law, should apply.[64] Thus, "when a suiter seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in

62. This is not to deny that Michigan also has an interest in this litigation. The question here is not which state is the more-appropriate forum, because there may be more than one forum which satisfies minimal constitutional requirements. *See Keeton*, 79 L. Ed.2d at 801; *World-Wide Volkswagen*, 444 U.S. at 301 (Brennen, J., dissenting). Independent of Michigan's admitted interest, the question is whether Florida's interest, coupled with all the other contacts, is minimally sufficient. Of course, if Michigan's interest were far greater, the appropriate remedy would have been a change of venue. *See Schaffer*, 433 U.S. at 228, n.8 (Brennan, J., dissenting) (and cases cited). But Mr. Rudzewicz did not raise that point in the circuit court.

63. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 186 (1979); *Schaffer*, 433 U.S. at 225 (Brennan, J., dissenting). *Cf. Hanson*, 357 U.S. at 258 (Black, J., with Burton and Brennan, J.J., dissenting). A few lower-court decisions on the point are cited at p. 26 n.44 of the Jurisdictional Statement.

64. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1130 (1966).

the opposite direction." *Schaffer*, 433 U.S. at 26 (Brennan, J., dissenting).

Third, Burger King has an unmistakable interest in litigating in a convenient forum.[65] That interest is not alone sufficient to confer jurisdiction,[66] but a plaintiff's contacts "may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises."[67] As we have argued, this interest is more than mere convenience; it extends to the broader regulatory objective of insuring uniformity and consistency throughout a nationwide system.[68]

Fourth, there is no evidence that Mr. Rudzewicz was significantly burdened by defending in the Florida court. Certainly Mr. Rudzewicz could afford the cost of traveling to Miami to appear. But the question is not one of inconvenience; the question is whether the necessity of defending in Miami somehow hindered Mr. Rudzewicz' effort

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65. *World-Wide Volkswagen*, 444 U.S. at 292, *citing Kulko*, 436 U.S. at 92.

66. *Hanson v. Denckla*, 357 U.S. at 253.

67. *Calder*, 79 L. Ed.2d at 811, *citing McGee*, 355 U.S. 220. *See Keeton*, 79 L. Ed.2d at 801 ("Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum").

68. This Court has said that "efficiency" is an important value from the perspective of a governmental system. *World-Wide Volkswagen*, 444 U.S. at 292. See von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1162-63, 1174 (1966). The same is true of a "legitimate regulatory program," Brilmayer, 1980 Sup. Ct. Rev. at 87, conducted through a private enterprise. It seeks uniformity and predictability. *Cf. M/S Brennan v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14, 17 (1972) (forum clauses create certainty and predictability). The resolution of disputes in a single forum aids that goal.

on the merits.[69] This consideration is relevant,[70] but not significant. Even a light burden will not confer jurisdiction if the contacts are otherwise insufficient.[71] And when the contacts are otherwise sufficient, even if "the impact on outsiders is heavier, it is not discrimination but only the natural consequence of multistate activity."[72]

Nevertheless, we should note that the record contains no evidence that Mr. Rudzewicz was significantly burdened in presenting his defense or counterclaim by the necessity of litigating in Florida. The circuit court's opinion states that the necessity of defending in Florida "severely impaired [Mr. Rudzewicz'] ability to call Michigan witnesses who might be essential to his defense and counterclaim" (J.A. 182). We can find no evidence of record to support this statement.[73] Nor at any time in this litigation has Mr.

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69. *See McGee*, 355 U.S. at 224; *World-Wide Volkswagen*, 444 U.S. at 301 (Brennan, J., dissenting). If the question were one of inconvenience, then Burger King could claim an equal or greater inconvenience of litigating in Michigan. *See* Jurisdictional Statement, p. 27 n.47.

70. *International Shoe*, 326 U.S. at 317. *See Hanson*, 357 U.S. at 259 (Black, J., with Burton and Brennan, J.J., dissenting).

71. *World-Wide Volkswagen*, 444 U.S. at 294; *Hanson v. Denckla*, 357 U.S. at 251.

72. Brilmayer, 1980 Sup. Ct. Rev. at 88. Thus, Professor Brilmayer suggests, the issue is not the reasonableness of the burden, but the reasonableness of the imposition of that burden by the forum—which depends on all the contacts. *Id.* at 85-88.

73. No pre-trial affidavits were submitted on this question. There was one point during the trial when the issue came up—when Mr. Rudzewicz was having trouble authenticating some documents, which might have required somebody from Michigan (*see* Tr. 574-75, 579). The trial court immediately offered the defendants as much time as might be necessary to secure the necessary authentication (Tr. 578, 582), and in that light Burger King stipulated to the authenticity of the documents (Tr. 598-99). This is the only evidence of record about the Michigan witnesses. As we have noted, most of the major players on the issues in litigation were from the Miami office. Indeed, the defendants deposed a number of Burger King employees in Michigan, but did not even transcribe any of those depositions—which is a good indication of their value.

Rudzewicz suggested concretely how his defense was burdened. And finally, in the balance of contacts drawn above, any burden upon Mr. Rudzewicz was warranted by his purposeful availment of the benefits of the forum.

Fifth and finally, reversal of the circuit court's decision will not create the potential for unfairness in other cases. The circuit court was disproportionately concerned about the impact of the district court's order in other contexts—in consumer transactions (J.A. 177), and in "sow-[ing] the seeds of default judgments against franchisees owing smaller debts" (J.A. 178). *See also* J.A. 181. As we have noted, however, the retail consumer cases have nothing to do with this case, and not even a blanket rule concerning franchises would affect their disposition. On the other hand, we do acknowledge that the arguments advanced above would sanction a general rule, or at least a presumption, that participation in an interstate franchise relationship, which is centralized rather than decentralized, should represent a form of consent to the jurisdiction of the franchisor's principal place of business—in return for which the franchisee receives significant economic benefits. Even that rather-qualified generalization, however, should be further qualified by the well-recognized principle that every question of this nature must be answered through the particular facts at hand.[74] There may be franchises that are primarily intrastate in nature. There may be franchises that delegate substantial decisionmaking authority to regional managers—or even to the franchisees. It was the obligation of the circuit court to decide this case, not imaginary cases. Given Mr. Rudzewicz' voluntary submission to the jurisdiction of the Florida court, reversal of the circuit court's opinion in this case will

74. *See Kulko*, 436 U.S. at 92; *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952). *See Helicopteros*, 80 L. Ed.2d at 414 (Brennan, J., dissenting).

be an affirmation of constitutional principles—not a threat to small businesses.

On the basis of the foregoing, we respectfully submit that Mr. Rudzewicz purposely solicited the protection and benefits of the forum; was called to answer for conduct growing out of that contact; and defended the suit in circumstances which were not unfair. The clear majority of circuit and district court decisions on this question agree with this conclusion.[75]

B. *Mr. Rudzewicz has Waived any Challenge to the Jurisdiction of the District Court.*

As we have noted, Mr. Rudzewicz expressly compromised and waived his right to appeal the trial court's finding of a trademark infringement under both federal and state law, and the injunctive relief awarded (R. 804). That was necessarily a waiver of any contention that the trial court lacked personal jurisdiction to adjudicate the trademark claims. At the very least, therefore, the circuit court's

75. We have cited several federal cases under statutes analogous to this one at p. 18 n.27 of our Jurisdictional Statement; and several others in which "doing business" statutes were applied under facts analogous to those here (p. 19 n.28). To the cases involving analogous statutes, we would add the following: *Kemper v. Rohrich*, 508 F. Supp. 444 (D. Kan. 1980); *Ammon v. Kaplow*, 468 F. Supp. 1304 (D. Kan. 1979); *Jeno's, Inc. v. Tupman Thurlow Co.*, 349 F. Supp. 1185 (D. Minn. 1972); *Sporcam, Inc. v. Greenman Bros., Inc.*, 340 F. Supp. 1168 (S.D. Iowa 1972). *Cf. Great Western United Corp. v. Kidwell*, 577 F.2d 1259 (5th Cir. 1978); *Strick Corp. v. A. J. F. Warehouse Distributors, Inc.*, 532 F. Supp. 951 (E.D. Pa. 1982); *Alchemie International, Inc. v. Metal World, Inc.*, 523 F. Supp. 1039 (D. N.J. 1981); *Sterling Industrial Corp. v. Telephone, Inc.*, 484 F. Supp. 1294 (W.D. Mich. 1980). To the "doing business" cases, we would add *Quasha v. Shale Development Corp.*, 667 F.2d 483 (5th Cir. 1982); *Austin v. North American Forest Products*, 656 F.2d 1076 (5th Cir. 1981); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303 (8th Cir. 1977); *Southern Investors II v. Commuter Aircraft Corp.*, 520 F. Supp. 212 (M.D. La. 1981); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355 (S.D. Tex. 1978).

opinion must be reversed with instructions to order reinstatement of the injunctive order.

We can think of no logical basis for contending that the arguments for the exercise of personal jurisdiction over the tort claims in this case are significantly stronger than the arguments for the exercise of jurisdiction over the contract claims growing out of the identical transaction.[76] It may be that the foreseeable impact in the forum of the franchisees' trademark infringement was a bit more damaging than its failure to pay money, but in the context of the array of jurisdictional contacts in this case, that one observation can hardly prove dispositive. The franchisees' purposeful availment of the benefits of the forum derived as much from the contractual franchise relationship as from the license agreement. Thus, in conceding and waiving his right to appeal the finding of trademark infringement, and with it of course the jurisdictional basis for that finding, Mr. Rudzewicz necessarily conceded as well that the trial court had jurisdiction over the contract claims. He was free of course to appeal the substantive finding of a contract violation—but he was not free to appeal the assumption of jurisdiction over those claims.

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76. *See Vencedor Manufacturing Co. v. Gougler Industries, Inc.*, 557 F.2d 886, 893 (1st Cir. 1977), *citing* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L. F. 533, 569-70.

CONCLUSION

Mr. Rudzewicz and his co-franchisee knowingly entered into a long-term interdependent relationship with a national corporation centered in Florida. In so doing, they purposefully invoked the benefits and protection of the forum. Burger King's cause of action grew out of that relationship, and by no standard was it unfair that Mr. Rudzewicz was subjected to the jurisdiction of the Florida courts to answer for conduct which foreseeably caused injury in Florida. Moreover, Mr. Rudzewicz effectively waived any right to challenge the trial court's jurisdiction. The decision of the circuit court should be reversed, and the cause remanded with instructions to affirm the district court's judgment.

Respectfully submitted,

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No. 83-2097

In The
Supreme Court of the United States
October Term, 1984

BURGER KING CORPORATION
A Florida Corporation

Appellant,

vs.

JOHN RUDZEWICZ

Appellee.

ON APPEAL FROM
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

APPELLEE'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Did Circuit Court Declare Florida Statute Unconstitutional?

Did the Circuit Court declare—as unconstitutional—the Florida long-arm statute [specifically, Sec. 48.193 (1)(g) which confers *in personam* jurisdiction upon one who breaches a contract by failing to perform required acts in Florida]?

Appellant argues, "Yes."

Appellee argues, "No."

Does Failure to Mail Checks Establish "Minimum Contact?"

Did Rudzewicz's failure to mail checks to Florida establish the constitutionally-required "minimum contacts" to confer *in personam* jurisdiction?

Appellant argues, "Yes."

Appellee argues, "No."

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1. OPINIONS AND JUDGMENTS BELOW

The Circuit Court's opinion below is reported as *Burger King Corporation v. MacShara,* 724 F.2d 1505 (11th Cir. 1984). It appears in the Joint Appendix (J.A.), at 166.

The District Court's "Findings of Fact and Conclusions of Law and Order Thereon" appear at J.A. 152; the "Final Judgment" is found at J.A. 164. Neither are reported.

2. JURISDICTIONAL GROUNDS

This Court has questioned whether it has jurisdiction over this appeal, reserving a final determination until completion of briefing and oral arguments.

Under its Rules, an appeal is available only if the Circuit Court held—as unconstitutional—Sec. 48.193(1)(g) of the Florida long-arm statute.[1]

The Florida long-arm statute was never found to be "repugnant to the Constitution"; rather, the Circuit Court held that, even though Rudzewicz's activities may have met the literal interpretation of the Florida long-arm statute, application of that statute to Rudzewicz, in these circumstances, violated his federal constitutional rights to "due process" and "fundamental fairness."

Furthermore, The Florida Supreme Court has never addressed, nor ruled on, the validity or constitutionality of Sec. 48.193(1)(g) of the Florida jurisdictional statute.

This appeal should be dismissed if this Court finds that the constitutionality of the Florida long-arm statute

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1 Rules of the Supreme Court, 16.1(a).

per se was not at issue, below. Furthermore, the alternative petition for *certiorari* should be denied because Rudzewicz did not have the required "minimum contacts" in Florida and because no federal or constitutional question has been raised in any of the courts below.

3. CONSTITUTIONAL PROVISIONS AND STATUTES

3.1. U.S. Constitution, Fourteenth Amendment

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

3.2. Florida Long Arm Statute, Sec. 48.193

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits that person . . . to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following:

• • •

(g) Breaches a contract in this state by failing to perform acts required by the contract to be performed in this State.

3.3. Michigan Franchise Investment Act

3.3.1. Franchise agreements within the act; offers; sales

(1) This act applies to all oral or written arrangements between a franchisor and franchisee in connection with the offer or sale of a franchise, including, though not limited to, the franchise offering, the franchise agreement, sales of goods or services, leases and mortgages of real or personal property, promises to pay, security interests, pledges, insurance, advertising, construction or installation contracts, servicing contracts, and

all other arrangements in which the franchisor or subfranchisor has an interest.

(2) An offer or sale of a franchise is made in this state when an offer to sell is made in this state, or an offer to buy is accepted in this state, or, if the franchisee is domiciled in this state, the franchised business is or will be operated in this state.

(3) An offer to sell is made in this state when the offer either originates from this state or is directed by the offeror to this state and received at the place to which it is directed. An offer to sell is accepted in this state when acceptance is communicated to the offeror in this state. An acceptance is communicated to the offeror in this state when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed. • • • MCL 445.1504

3.3.2. Franchise sales, prerequisites

A franchise which is subject to registration under this act shall not be sold without first providing to the prospective franchisee, at least 1 week prior to the execution by the prospective franchisee of any binding franchise or other agreement or at least 1 week prior to the receipt of any consideration, whichever occurs first, a copy of the prospectus, together with a copy of all proposed agreements relating to the sale of the franchise. MCL 445.1516

3.3.3. Damages; recision

A person who offers or sells a franchise in violation of sections 5(1), 6, or 16 is liable to the person purchasing the franchise for damages or recision, with interest at 6% per year from the date of purchase and reasonable attorney fees and court costs. • • • MCL 445.1531

D. COUNTER STATEMENT OF THE CASE

4.1. Summary

4.1.1. Statute Not Declared Unconstitutional

An appeal cannot lie here because the Circuit Court never declared the Florida long-arm statute to be unconstitutional. The Circuit Court took some care to recite the issue at bar:

> This case presents the question whether a Florida court can exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami.[2]

In its holding, the Circuit Court did not effect the constitutionality of the Florida long-arm statute:

> In sum, we hold that the circumstances of the Drayton Plains franchise and the negotiations which led to it left Rudzewicz bereft of reasonable notice and financially unprepared for the prospect of franchise litigation in Florida. Jurisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process. We therefore reverse the judgment.[3]

In dismissing the Complaint for lack of personal jurisdiction, the Circuit Court held that:

(a) While Florida's long-arm statute may appear to confer jurisdiction over the person of Rudzewicz . . .

(b) Nonetheless, the exercise of personal jurisdiction over Rudzewicz did not comport with basic "due process" requirements of the United States Constitution.

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2 J.A. 172.

3 J.A. 182-183.

4.1.2. No "Minimum Contacts"

Burger King's Lease/Sublease Agreement (J.A. 76) imposed an obligation on Rudzewicz to mail payments to Miami, Florida. The Circuit Court found that:

> With the exception of a Burger King University management course which MacShara [not Rudzewicz] attended in Florida and the Miami payment obligation, the contracts provided for no contact of any kind between the Florida headquarters and the franchisees.[4]

The Florida long-arm statute allows for *in personam* jurisdiction where a non-resident, contracting party fails to do an act—required by the contract to be done—in Florida.[5] Additionally, of course, a non-resident defendant must have the constitutionally-requisite "minimum contacts" with the forum state to allow such *in personam* jurisdiction.[6]

Burger King argues that Rudzewicz's non-mailing of rent to Florida was a failure to do an act—required by the Lease/Sublease Agreement to be done—in Florida. Please recall that the Lease/Sublease Agreement (and not the Franchise Agreement) required that rent be mailed to a U.S. Post Office box, at a general mail facility, in Miami, Florida (J.A. 113, Paragraph 14.2; Tr 85).

There is no evidence that Rudzewicz ever mailed even one rent check to Florida.

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4 J.A. 171.

5 Section 48.193(1) (g), Fla. Stat. (1983).

6 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

4.13. No Jurisdiction by "Implied Consent"

On this appeal, Burger King introduces a new argument that was not advanced in its Jurisdictional Statement. Burger King now argues that *in personam* jurisdiction over Rudzewicz was achieved by his "implied consent." Quoting Appellant's brief:

> [T]he argument advanced [by Burger King] would sanction a general rule, or at least a presumption, that participation in an interstate franchise relationship, which is centralized rather than decentralized, should represent a form of consent to the jurisdiction of the franchisor's place of business. . . .[7]

To the contrary, Rudzewicz did not actively pursue commercial transactions throughout the various States but, rather, only in Drayton Plains, Michigan. Rudzewicz knowingly reached out from his domicile in Michigan (not to other states but, rather) to Burger King's Michigan regional headquarters. Rudzewicz effected nothing in Florida and received no economic advantages in Florida.

Rudzewicz did not intentionally become a part of an interstate economic network for pecuniary gain: he shipped none of his hamburgers across state lines; rather, he merely sold Whoppers and fries to passers-by in Drayton Plains, Michigan. The Circuit Court noted that "the contracts contemplated the startup of a local Michigan restaurant whose profits would derive solely from food sales made to customers in Drayton Plains" (J.A. 179).

4.2. Uncontroverted Facts

Only four witnesses testified at trial: Burger King's Tom Vrabel (Tr 82-166) and Helen Donaldson (Tr 166-

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7 Appellant's Brief, p. 46.

250), plus franchisees Brian MacShara (Tr 470-597) and John Rudzewicz (Tr 39-82, 262-469). Burger King introduced no evidence to rebut the testimony of Rudzewicz and MacShara.

Therefore, the facts presented below are uncontroverted by any other evidence in the record.

4.3. Background

Brian MacShara's formal education included 18 months of college and his employment background included a brief stint as a hamburger-flipper at a Burger King restaurant (Tr 471); however, most of his experience had been in construction work with his father's firm (Tr 472).

John Rudzewicz is a certified public accountant with his own firm, Follmer, Rudzewicz & Co., P.C., located not far from Drayton Plains, Michigan. Personally, he never did any accountancy affecting any Burger King restaurant; however, in the past, some public accountants in his firm had done some work for a Burger King franchisee (Tr 425).

Rudzewicz wanted to invest in a Burger King restaurant that MacShara would operate. Burger King understood that Rudzewicz was the financial partner (Ex 1; Tr 39), while MacShara was to be the day-to-day operating partner (Exs 1, 11). Burger King sold Rudzewicz and MacShara a $45,000 franchise in Drayton Plans, Michigan (J.A. 41) and gave them a $1.2 million lease (J.A. 76), both for 20 years.

4.4. Franchisees and Franchise in Michigan

Both franchisees are domiciled in Michigan (J.A. 152, 153; Tr 39-40, 365, 391). Moreover, the franchised business (Store 775) was located in Michigan (J.A. 153; Tr 85, 392).

Under the Michigan Franchise Investment Act, either condition alone would invoke Michigan's comprehensive statutory and administrative scheme to regulate franchises.[8]

4.5. Burger King's Michigan Headquarters

Virtually every contact between Rudzewicz and Burger King was in Michigan.

Burger King maintains a sizeable and well-established regional headquarters office in Birmingham, Michigan—within minutes of Rudzewicz's office. This Michigan regional headquarters supervised Store 775 (Exs P, T).

Burger King does " . . . acknowledge that the franchisees had direct contact with the [Michigan] district office. . . ."[9] The Circuit Court's opinion elaborates that "during the course of negotiations, which lasted five months, the Michigan district office was Burger King's sole representative in dealing with Rudzewicz and MacShara" (J.A. 169). Furthermore, the Circuit Court said:

> Nothing in the course of the negotiations gave Rudzewicz reason to anticipate a Burger King suit outside of Michigan. The only face-to-face or even oral contract Rudzewicz had with Burger King throughout months of protracted negotiations was with representatives of the Michigan office.
>
> Burger King had the Michigan office interview Rudzewicz and MacShara, appraise their application, and discuss price terms, recommend the site which the defendants finally agreed to, and attend the final closing ceremony.
>
> There is no evidence that Rudzewicz ever negotiated with anyone in Miami or even sent mail there during negotiations. He maintained no staff in the state of Florida, and as far as the record reveals, he had never even visited the state.[10]

Rudzewicz's first discussions with Burger King about owning a franchise occurred in Michigan in 1977 (Tr 473); all subsequent meetings and consultations affecting this transaction likewise occurred in Michigan (Tr 506).

Burger King interviewed prospective franchisee Rudzewicz at its Michigan regional office. Burger King mailed Rudzewicz its letter, accepting him as a "franchisee," from its Michigan regional headquarters (Ex 2).

At the conclusion of each step in this process, Burger King sent documents to Rudzewicz (still in Michigan) (*e.g.,* Prospectus, Preliminary Agreement, Franchise Agreement, Lease/Sublease Agreement, and assorted correspondence) (J.A. 169).

The Prospectus, affecting this franchise offering, was registered with the State of Michigan's Department of Commerce, Office of Franchise and Agent Licensing (J.A. 119). This Prospectus was mailed to franchisees in Michigan (J.A. 5).

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8 MCL 445.1504(2).

9 Appellant's Brief, p. 13 n. 11.

10 J.A. 178-179.

The Circuit Court's opinion states that it was Burger King's Michigan district manager who

> . . . persuaded [the franchisees] to acquire an existing store in Drayton Plains, Michigan to avoid the higher rent that would be entailed if they insisted upon construction of a new building. He also convinced them to purchase and install $165,000 worth of equipment before the final rental charge had been computed.[11]

The $165,000 of equipment was purchased by a Michigan limited partnership called "RMBK-2" which had two partners—Rudzewicz and John Ureel (who was otherwise uninvolved in this franchise transaction). Co-franchisee MacShara was not involved in "RMBK-2."

The Circuit Court found that MacShara and Rudzewicz never formed a partnership (J.A. 182, n. 14). Rather, they incorporated under the name "RMBK Corp." (Tr 49) to operate Store 775 (Tr 282). These franchisees assigned the Franchise Agreement to "RMBK Corp." which operated Store 775.

Burger King admits that its " . . . Michigan office was involved in [an] extended period of negotiation . . . " with franchisees.[12] Neither before, during, nor after these negotiations did Rudzewicz ever go to Florida to execute any document whatsoever (Tr 201, 220), nor was any part of the franchised restaurant business ever conducted in Florida. The Circuit Court noted:

> Under the contract, the local Michigan district office was responsible for providing all of the

11 J.A. 169.

12 Appellant's Brief, 19.

> services due Rudzewicz, including advertising and management consultation. Supervision, moreover, emanated from the office alone. To Rudzewicz, the Michigan office was for all intents and purposes that embodiment of Burger King. He had reason to believe that his working relationship with Burger King began and ended in Michigan, not at the distant and anonymous Florida headquarters."[13]

4.6. Offer Made/Accepted in Michigan

The "offer" of this particular franchise to Rudzewicz came in the form of the Preliminary Agreement (J.A. 37), which was sent by Burger King to Michigan (Ex 3, 4). Twice, Burger King wrote to Rudzewicz in Michigan, encouraging him to tender his "offer" by executing this Preliminary Agreement (Exs 5, 6).

Ultimately, Rudzewicz did make an "offer" to operate a Burger King franchise by signing this Preliminary Agreement; this, too, was done in Michigan. In turn, Burger King communicated its acceptance of that "offer" back to Rudzewicz (who, still, was in Michigan) (Ex 7).

Only four days before the "closing," Burger King tendered its complete version of the Franchise (J.A. 41) and Lease/Sublease (J.A. 76) Agreements to franchisees in Michigan (Tr 22-23, 202). The Circuit Court noted Burger King's take-it-or-leave-it attitude:

> . . . Burger King decided to schedule the grand opening for May 31, 1979, the close of its fiscal year, to ensure that the sale appeared in the company's year-end statement.
>
> On May 29, the day the final agreements arrived for signature, Rudzewicz and MacShara finally

13 J.A. 179.

learned what rent Burger King expected them to pay [*e.g.*, $4,166 to $5,286 per month]. The figure was far in excess of the amount Rudzewicz had projected [*e.g.*, $2,010 to $2,500 per month].

[Rudzewicz] telephoned [Burger King's Michigan Franchise District Manager] Hoffman and demanded a lower figure. According to Rudzewicz, Hoffman replied that the rent computation was out of his hands. If Rudzewicz was unwilling to accept the figure Burger King proposed, Hoffman continued, he was always free to decline the franchise, rip out the fixtures [valued at $165,000] he had installed at his own expense, and resell them at a loss.

On June 4 Rudzewicz and MacShara signed the lease and franchise agreements in their individual capacities at a Michigan closing ceremony attended by employees of the [Burger King] local district office.[14]

After executing these documents (Tr 365), Rudzewicz tendered these Agreements, on the spot, to Burger King's Michigan regional representative, along with his $45,000.00 certified check (Ex 10), drawn on a Michigan-based bank (*viz.*, Michigan National Bank).

Burger King returned the finally-executed versions of these two Agreements back to franchisees in Michigan (Ex K; Tr 314). This act alone invokes application of the Michigan Franchise Investment Act.[15]

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14 J.A. 169-170; Tr 201, 220.

15 MCL 445.1504(2) (3).

4.7. Continuous, Systematic Business in Michigan

Franchisee Rudzewicz purchased equipment and supplies from the Michigan office of Burger King's Distron and Davmor Divisions. In exchange, payment was mailed to Burger King's regional office in Michigan (Ex M-A; Tr 156).

When Rudzewicz's payments fell in arrears, Burger King mailed all notices of delinquency, default, and termination to Michigan.[16]

In sum, Rudzewicz maintained a continuous and systematic business in Michigan—not in Florida!

4.8. No Continuous, Systematic Business in Florida

Rudzewicz had no place of business in Florida, nor was he ever licensed or authorized in any jural form (neither as a corporation, partnership, nor under any assumed name) to do business in Florida.

Franchisee Rudzewicz had no agent for service of process in Florida. He never performed any act in Florida related to Burger King, never provided a related service in, or sold a related product that reached, Florida.

Rudzewicz never signed any agreement in Florida. He never had any employee based in, nor ever recruited any employee from, Florida. In addition, franchisees never owned any real property in Florida, never maintained any office or establishment there, and never maintained any business records in Florida.

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16 Exs A, B, E, F, G, J, V, M-F, M-I, 17, 18 and 19.

Rudzewicz never availed himself of any so-called "benefits" of Florida law. Florida law offered no benefits to Rudzewicz, only detriments. For example, Florida has no comprehensive, franchise regulatory scheme (as does Michigan): there is no Florida franchise investment act, no Florida "office of franchise licensing" overseeing franchisors, and no protective umbrella under which franchisees can seek shelter from any overreaching by Burger King.

The only "benefit" offered by Florida law to Rudzewicz was the albatross of traveling some 1,200 miles from Detroit to Miami to defend himself in a federal court, far removed from Burger King's Michigan regional headquarters where this entire franchise process was conceived and aborted.

Certainly, Florida law imposed no obligations on Burger King, while offering Burger King every benefit (*viz.*, litigating against their "disputatious franchisees" in Miami).

In fact, Michigan (not Florida) was the only state significantly affected by Rudzewicz's franchise activities. It was in Michigan where business taxes, property taxes, and payroll taxes were paid; where all employees were found and their wages paid; where Burger King headquartered its regional employees to supervise Store 775; and, where Burger King had registered its statutorily-required Prospectus (J.A. 5).

In sum, Rudzewicz maintained no continuous and systematic business in Florida but, rather, only in Michigan!

4.9. Michigan Franchise Investment Act Applies

The Circuit Court noted "the particular distribution of power in the franchise relationship" and commented that:

> In a franchise contract, "the franchisor normally occupies [the] dominant role. Annot., 67 A.L.R. 3d 1299, 1302 (1975). *See, e.g., Shell Oil Co. v. Marinello,* 63 N.J. 402, 307 A.2d 598, 67 A.L.R.3d 1291 (1973), *cert. denied,* 415 U.S. 920, 94 S.Ct. 1421, 39 L.Ed.2d 475 (1974). In recent years, certain states, including Michigan, have moved to enact statutes to police the more flagrant excesses of franchises. Annot., 67 A.L.R.3d at 1301.[17]

The Michigan Franchise Investment Act (called the "Franchise Act"), MCL 445.1501 *et seq.*, is more than a dozen pages of comprehensive, remedial legislation that is systematic in its regulation of the franchise process and its participants. That law governs this franchise transaction, these franchisees, and this franchised restaurant.

Under Michigan's Franchise Act, Burger King admitted it was required to (and did) register its Uniform Franchise Offering Circular (called "Prospectus" (J.A. 5)) with the State of Michigan's Department of Commerce, Office of Franchise and Agent Licensing (J.A. 119; Tr 203, 205), pursuant to MCL 445.1506.

Burger King did not voluntarily register its Prospectus. This particular franchise transaction was not exempt from registration. In fact, Michigan's Office of Franchise Licensing made a determination that Burger King was subject to the Franchise Act; it found that Burger King obtained no

> . . . exemption [from the Michigan Franchise Investment Act] for the sale of the Burger King franchise to be located at 4983 Dixie Highway, Drayton Plains, Michigan, Store No. 775, to Brian

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17 J.A. 181.

MacShara and John Rudzewicz on June 4, 1979. . . .[18]

4.10. Burger Kind Admits Michigan Act Governs

Contrary to the "governing law" provision of its Lease/Sublease Agreement, Burger King readily concedes (as cited below) that the true "governing law" here was the Michigan Franchise Investment Act—and not Florida contract law![19]

Burger King admits that in ". . . the State of Michigan, there is a required compliance with Michigan's investments franchise law" (Tr 13). Specifically, Burger King's corporate Secretary (and signator to all three agreements) admitted that ". . . Burger King in this particular transaction [is] subject to the Michigan franchise investment law . . ." (Tr 191).[20]

In fact, when Burger King conveyed its Prospectus to Rudzewicz, it admitted that it did so "pursuant to the requirements of Michigan's Franchise Investment Law . . ."

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18 J.A. 19.

19 In the dissenting opinion of the case below, and contrary to this Court's holding in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), Judge Johnson incorrectly urged that, because Rudzewicz had signed a contract which contained a Florida "governing law" provision, he had purposely availed himself of the benefits and protections of Florida law and, thus, could be sued in Florida. Burger King itself has repudiated the efficacy of this Florida "governing law" provision, as it applies to Rudzewicz; this Court held in *Kulko* that even though a state may be the " 'center of gravity' for choice-of-law purposes [it] does not mean that California has personal jurisdiction over the defendant."

20 MCL 445.1504(1).

(J.A. 5). And, on the very cover sheet of this Prospectus, Burger King declares that it is subject to the Michigan Franchise Investment Act (J.A. 8).

Finally, Burger King advised its own Michigan Franchise District Manager that Rudzewicz's "franchise approval in [Michigan] is in compliance with franchise legislation presently in effect" (Ex Z).

4.11. Burger King Violated Michigan Franchise Act

In its Prospectus, Burger King admitted that:

> The Michigan franchise investment law makes it unlawful to offer or sell any franchise in [Michigan]
>
> . . . without first providing to the prospective franchisee, at least 7 days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or *at least 7 days prior to the payment of any consideration by the franchisee*, whichever occurs first, a copy of the offering circular together with a copy of all proposed agreements relating to the franchise [emphasis added].[21]

Burger King's corporate Secretary was a signatory to the Preliminary Agreement (J.A. 40), Franchise Agreement (J.A. 74), and Lease/Sublease Agreement (J.A. 116). She admits that Burger King was aware of this seven-day, statutory mandate (Tr 191).

Burger King's Michigan Franchise District Manager accepted Rudzewicz's $45,000 check on June 4th (Ex 10), when the binding agreements (J.A. 41, 76) had just been received on May 31st, *only four days before the June 4th closing*.

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21 J.A. 8-9; Tr 208; see also, MCL 445.1516.

Burger King admits that franchisees did not have the binding Franchise Agreement (J.A. 41) (which included the name and jural form of doing business of the franchisees), or the binding Lease/Sublease Agreement (J.A. 76) (which included the name, jural form of doing business of franchisees, plus the minimum monthly rent) for the statutorily-required seven days prior to their date of execution (Tr 193-194, 200).

Burger King's failure to comply with this statutory prerequisite constitutes a *per se* violation of Michigan's Franchise Investment Act.[22] As such, it automatically entitles franchisees to damages or recision of the Franchise and Lease/Sublease Agreements.[23]

4.12. Difficult to Defend in Florida

Burger King admitted, at trial, that it was burdensome for Rudzewicz to defend himself in Florida because many witnesses from its own Michigan regional headquarters, and others, would have to be brought to Miami at great expense to Rudzewicz (Tr 574-575).

Even the Circuit Court noted that:

> Just as Rudzewicz lacked notice of the possibility of suit in Florida, he was financially unprepared to meet its added costs. * * *
>
> There is no indication that Rudzewicz had any latitude to negotiate a reduced rent or franchise fee in exchange for the added risk of suit in Florida. * * * Burger King resisted price concessions, only to sue Rudzewicz far from home. In doing so, it severely impaired his ability to call Michigan witnesses who might be essential to his defense and counterclaim.[24]

22 MCL 445.1516.

23 MCL 445.1530.

Yet, after the trial and upon appeal, Burger King, almost facetiously, represents that:

> . . . Mr. Rudzewicz was no less inconvenienced by the necessity of litigating in Florida than would Burger King be inconvenienced by the necessity of litigating in Michigan—and prospectively, in all 50 states. At best, this consideration is a standoff.
>
> If the question were one of convenience, then Burger King could claim an equal or greater inconvenience of litigating in Michigan.[25]

4.13. "Choice of Law" Provision

Burger King also admits that "the choice of [Florida] law provision does not require that all suits concerning this [franchise] Agreement be filed in Florida" (J.A. 72).

Indeed, Burger King concedes that it is "doing business," "found," and "situated" in Michigan by acknowledging that:

> [d]uring all this time, of course, the franchisees could have brought an action against Burger King in Michigan—asserting all the claims which they eventually asserted in their Florida counterclaim.[26]

Thus, when Burger King is the plaintiff, you won't "have it your way" because it sues all franchisees in Miami, regardless of their domicile or where they are doing business. Many Burger King franchisees have chal-

24 J.A. 180, 181-182.

25 Jurisdictional Statement, 27; Appellant's Brief, 45.

26 J.A. 146; Appellant's Brief, p. 20, n. 19.

lenged personal jurisdiction in the Southern District of Florida, without success.[27]

5. SUMMARY OF ARGUMENT

5.1. No "Appeal of Right"

5.1.1. Long Arm Statute Uneffected

Burger King, a Florida corporation, appeals from the decision of the United States Court of Appeals, Eleventh Circuit.

Burger King misperceives that the Circuit Court held—as unconstitutional—the Florida long-arm statute. Not true! The Circuit Court made no ruling on that statute's constitutionality. Rather the Circuit Court held that:

> a Florida court can [not] exercise jurisdiction over a non-resident purchaser by virtue of his contract with a Florida corporation obligating him to remit payments to Miami.[28]

5.1.2. No Appeal of Right

There is an appeal here only if the Circuit Court held the Florida long-arm statute unconstitutional. Certainly, there is a right of direct appeal by any party relying on a state statute held by a court of appeals to be invalid as

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27 See these U.S. District Court, Southern District of Florida cases: *Burger King Corp. v. Elliott*, 80-2694-Civ-EBD; *Burger King Corp. v. Wagner*, 80-942-Civ-EBD; *Burger King Corp. v. Snow*, 80-295-Civ-SMA; *Burger King Corp. v. Robinson*, 79-5824-Civ-EPS; *Burger King Corp. v. Mason*, 78-2932-Civ-EBD; *Burger King Corp. v. Levine*, 80-5852(08); *Burger King Corp. v. CPM&F, Inc.*, 537 F.Supp. 651 (S.D. Fla. 1982) where Burger King tried to sue a Hawaiian defendant in Florida.

28 J.A. 172.

repugnant to the Constitution.[29] However, since the constitutionality of the Florida long-arm statute was uneffected by the Circuit Court's decision, there can be no appeal.[30]

Finally, Burger King has conceded that "no court involved in the instant action has certified to the Florida Attorney General the fact that the constitutionality of a Florida Statute is drawn in question" (Jurisdictional Statement, at ii). Indeed, neither the U.S. District Court, nor the 11th Circuit Court of Appeals, certified the issue to the Florida Supreme Court; therefore, neither of these two courts must have thought the constitutionality of the statute was being called into question.

The Circuit Court's studied opinion was eloquent, but it contained no "holding" effecting the constitutionality of the Florida long-arm statute. More subtly, the Circuit Court only held ". . . that invocation of that [long-arm] statute *under these circumstances* exceeds the bounds of due process" (Jurisdictional Statement, at A7).

Burger King improperly invokes the jurisdiction of this Court in seeking an appeal.[31] In sooth, Burger King can only petition for *certiorari* (which should be denied), for it has no appeal.

5.1.3. Failure to Act is not "Minimum Contact"

Rudzewicz's failure to mail checks to Florida *per se* does not establish the constitutionally-required "minimum con-

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29 28 U.S.C. 1254(2).

30 Rules of the Supreme Court, 16.1(a).

31 28 U.S.C. 1254(2).

tacts" to confer *in personam* jurisdiction in Florida. Rather than it being a "contact," the failure to do an act is a "non-contact." Only a semantic gymnast could contort such a negative into a positive.

The Circuit Court's Opinion Below conflicts with no other federal court of appeals on the same matter. In fact, the 11th Circuit's Opinion Below agrees with rulings on the same matter from the 5th Circuit, 6th Circuit, 7th Circuit, and 8th Circuit (Jurisdictional Statement, p. 28, n. 48), in addition to agreeing with every opinion of this Court on the issue of "minimum contacts."

Moreover, the Opinion Below conflicts with no decision of the Florida Supreme Court on the same matter. While the Florida Supreme Court has never ruled on the same matter, the Opinion Below agrees with decisions of several Florida state appeal courts on the same matter.

Finally, the Circuit Court's Opinion Below follows the accepted and usual course of judicial proceedings and does not call for an exercise of this Court's power of supervision. Indeed, the Opinion Below is in tune with the long litany of personal jurisdiction cases handed down by this Court since 1945 (Jurisdictional Statement, p. 16, n. 20).

5.1.4. Burger King's Policy Objective

Given the chance, Burger King would sue the franchisees (of its 3,000 nationwide, identical restaurants) in the Miami federal court—regardless of whether the franchise is found in Hawaii, Alaska or, apparently even, Australia! Please appreciate that "Burger King does business in all 50 states, the Commonwealth of Puerto Rico, and 9 other nations" (J.A. 10-11).

Burger King confesses its true motive when it asks this High Court to do, by judicial fiat, what the Florida legislature has refused to do, namely fashion a new rule that says:

> . . . participation in an interstate franchise relationship, which is centralized rather than decentralized, [is] a form of consent to the jurisdiction of the franchisor's principal place of business. . . .[32]

With no hint of shame, Burger King candidly promotes the Orwellean "efficiency" to be realized when only the Miami federal courts—unfettered by that clutter of minor U.S. district courts elsewhere—would be permitted to pursue the unending search for "uniformity and predictability" in adjudicating Burger King's complaints with its "disputatious franchisees."

Unabashedly, Burger King seeks to achieve a broad policy objective in this appeal. Rather than rely on some "governmental system," Burger King itself, guided by Miami's federal court, would conduct a "legitimate regulatory program" over its globally-scattered franchisees. Contending that "the resolution of disputes in a single forum aids that goal" of "uniformity and predictability," Burger King's

> . . . interest is more than mere convenience; it extends to the broader regulatory objective of insuring uniformity and consistency throughout a nationwide system.[33]

Will this brand of thinking evolve into a federal "car court" for General Motors in Detroit? A "cola court" for

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32 Appellant's Brief, p. 46.

33 Appellant's Brief, p. 44.

Coke in Atlanta? And, a "hamburger court" for Burger King in Miami? So, when we view this case with some judicial and public policy perspective, we must admit—as does Burger King—that:

> [t]his case may determine whether [Burger King] must litigate not under a coherent set of [Florida] laws enforced in [Florida]—but wherever a disputatious franchisee may reside.[34]

Nonetheless, we believe this Court need not consider Burger King's centralized approach to litigation because, in no respect, did the 11th Circuit Court ever declare, as unconstitutional, Florida's long-arm statute.

5.2. No "Minimum Contacts"

A plethora of cases have held that the mere payment of rent (not to mention its non-payment) does not *per se* establish any "minimum contacts" in the forum state by a non-resident payor. There have been many cases, where the non-resident defendant had significantly more contacts than Rudzewicz did here, and the complaint still was dismissed for the lack of constitutionally-required "minimum contacts."[35]

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34 J.A. 15.

35 Burger King misrepresents to this Court that Rudzewicz's " . . . post-trial compromise of the trademark claims was a waiver of any challenge to the jurisdiction of the district court" (Appellant's Brief, pp. 23, 47). That misrepresentation is intellectually untenable. First, this question of waiver was never presented to the 11th Circuit as an issue to be decided, it was not raised in the Jurisdictional Statement filed with this Court, and it is now mentioned, for the first time, in Appellant's Brief; as such, this contravenes Supreme Court Rule 34(1) (a) and any discussion should be disregarded or striken by this Court.

(Continued on next page)

The Supreme Court need not scrutinize, again, the constitutional touchstone of "due process" and fundamental fairness. Rudzewicz should only be required to defend in Michigan, where he is domiciled, where this business transaction occurred, and where the franchised restaurant is located, and not in Florida where he conducted no continuous and systematic business and had not even the most fleeting, minimal contact.

6. ARGUMENT

61. No Appeal of Right

No Appeal of Right
Since Florida Statute
Never Declared Unconstitutional

> **The Circuit Court never declared—as unconstitutional—Sec. 48.193(1) (g) of the Florida Statutes (which confers long-arm jurisdiction upon one who breaches a contract in Florida by failing to perform acts, required by the contract, to be performed in Florida).**

This Court has questioned whether it has jurisdiction to hear this case as an appeal. Apparently, this jurisdictional concern arises over whether the 11th Circuit ever declared—as unconstitutional—Florida's long-arm statute.

In the mind's eye of Burger King, it sees some phantom declaration of unconstitutionality by the Circuit

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(Continued from previous page)

Second, Rudzewicz only waived his right to appeal the trial court's Finding of Fact, No. 35 (J.A. 159) and its Conclusion of Law, Paragraph M (J.A. 162); an agreement not to appeal a particular finding or conclusion is only that, nothing more, and does not waive any challenge to the fundamental, public policy question of jurisdiction argued here.

Court, despite no visible evidence to support this specter. Burger King should rest assured that its fears are nothing more than ghosts in the closet because Rudzewicz has never challenged the constitutionality of the Florida long-arm statute, nor has any court considered or ruled on its validity or otherwise found it to be "repugnant to the Constitution."

6.1.1. "Constitutionality" Never Challenged

Rudzewicz never challenged the long-arm statute's constitutionality in his original "minimum contacts" motion filed in District Court (J.A. 136); neither did the District Judge, specifically and unquestionably, discuss that statute *per se* when ruling on the motion (J.A. 138-139).

When Rudzewicz appealed to the Circuit Court, again, he never challenged the constitutionality of the long-arm statute. In fact, Rudzewicz raised only the "minimum contacts" question; in framing his issue, he asked the Circuit Court to determine:

> WHETHER the Florida U.S. District Court has no *in personam* jurisdiction over franchisee Rudzewicz because he had no "minimum contacts" in Florida?

Upon oral argument, no one on the Circuit Court panel questioned either counsel about the long-arm statute's constitutionality.

Burger King first insinuated that the 11th Circuit had injudiciously amputated a portion of Florida's long-arm statute when it filed "Appellee's Petition for Rehearing (by the Original Panel) and Suggestion of *En Banc* Consideration upon Rehearing." No jurist on the 11th Circuit even wanted to poll the other circuit judges on Burger King's Petition; thus, the Court ordered that:

> . . . no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled . . . the Suggestion for Rehearing En Banc is DENIED.

J.A. 186. One might ask, rhetorically: if even one judge in the 11th Circuit thought that the Panel had held the Florida long-arm statute to be "repugnant to the Constitution," wouldn't that judge, at least, have suggested a poll?

Plain and simple: the Opinion Below never declared the Florida long-arm statute unconstitutional.[36]

6.1.2. "Act of Congress" Not at Issue

Contrary to the clear dictates of this court and Congress, Burger King improperly relies on several rulings of this Court as supporting an appeal here regarding the constitutionality of a state's long-arm statute; however, Burger King's reliance is misplaced.

28 U.S.C. Section 1252 provides for appeal to this Court from decisions invalidating Acts of Congress. Contrary to Burger King's representations, no Act of Congress has been invalidated, nor has any Act of Congress ever been at issue in this matter such as to give this Court jurisdiction by appeal.

Burger King promotes its appeal arguing several cases which are not at all common or similar to those in

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36 An aside: in reading the decision in *Federal Reporter 2d*, the editor's headnotes never suggested that the state statute was held unconstitutional.

this particular case. Burger King proffers *Calder v. Jones*[37] in support of its appeal. However, in *Calder,* although this Court granted *certiorari,* it concluded that jurisdiction by appeal did not apply since the decision below did " . . . not purport to determine the constitutionality of the California jurisdictional statute."[38] The Court also dismissed the appeal of *Kulko,* which Burger King proffers as well, since the constitutionality of the state jurisdictional statute had not been raised in the lower court.[39]

6.1.3. Congressional Test for Appeal

Congress would allow an appeal here only if the Circuit Court diagnosed a constitutional infirmity in Florida's long-arm statute (which, in truth, was never detected). We must test Burger King's premise against congressional limitations.[40]

This Court's appellate powers have been clearly defined by no less a Constitutional authority than Chief Justice Marshall:

> The appellate powers of this court are not given by the Judicial Act. They are given by the Constitution. But they are limited and regulated by the Judicial Act. And by such other acts as have been passed on the subject.[41]

Furthermore, as reiterated by Chief Justice Fuller, almost 100 years ago:

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37 *Calder v. Jones,* — U.S. —, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

38 *Id.* at 1486 n.7.

39 *Kulko v. Superior Court of California,* 436 U.S. 84 (1978).

40 28 U.S.C. 1254(2).

41 *Durousseau v. U.S.,* 6 Cranch 307, 3 L.Ed. 232 (1810).

> From *Wiscart v. Dauchy,* 3 Dall. 321, to *American Const. Co. v. Jacksonville, T. & K.W.R. Co.,* 148 U.S. 372, 13 Sup. Ct. Rep. 758, it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of congress upon that subject.[42]

These rulings control today, as they did when first announced. Pertinent here, Congress legislated that:

> Cases in the courts of appeals may be reviewed by the Supreme Court . . . by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . and the review on appeal shall be restricted to the Federal questions presented.[43]

This Court has consistently restricted appeals regarding the constitutionality of state statutes to those particular cases where:

> . . . the record shows that the question of the validity under the federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state . . . or has in fact been decided by it . . . and that its decision was necessary to the judgment [citations omitted].[44]

In further analysis of the necessity for this doctrine, the Court has clearly provided:

> Apart from the reluctance with which every court should proceed to set aside legislation as non-constitutional on grounds not properly presented,

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42 *Colorado Cent. Consolidated Min. Co. v. Turck,* 150 U.S. 35, 36 (1983).

43 28 U.S.C. 1254(2).

44 *Wilson v. Cook,* 327 U.S. 474, 480 (1946).

> due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, refuses to consider any grounds of attack not raised or decided in that court.[45]

These findings and reasoning of the Court have been consistent in every opportunity in which it has been requested to rule on the constitutionality of a state statute.[46]

6.1.4. The Circuit Court's Holding

The Circuit Court did not find Florida's long-arm statute as "repugnant to the Constitution" but, rather, found that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process" (J.A. 183).

Burger King argues that the decision of the Circuit Court ". . . *necessarily* held the Florida statute unconstitutional" [emphasis in the original] (*Appellant's Brief*, p. 26). However, this Court has

> . . . consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute.[47]

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45 *Id.* at 484.

46 *See Kulko v. Superior Court of California, supra,* where the Court dismissed the appeal because the jurisdictional statute had not been contended in state court as being unconstitutional; *United Gas Pipe Line Company v. Ideal Cement Company,* 360 U.S. 134 (1962).

47 *Silkwood v. Kerr-McGee Corp.,* — U.S. —, 19 S.Ct. 615, 620, 74 L.Ed.2d 443 (1984).

As in *Silkwood,* the Circuit Court here did not rule the Florida statute unconstitutional; rather, the 11th Circuit merely held that the Florida long-arm statute was inapposite in this particular situation since its operation (*vis-a-vis* Rudzewicz) offended the fundamental fairness requirement of due process.

It was the *operation* of Florida's statute that the Circuit Court found offensive, not the constitutionality of its *language.*

6.1.5. No Express Declaration

In a similar holding, this Court reviewed a decision of the California Superior Court; in fact, the opinion from that state's high court did not rule on the constitutionality of a California statute. This Court explained there that:

> The opinion below does not purport to determine the constitutionality of the . . . jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction.[48]

Indisputedly, *Kalko* and *Silkwood* clearly deny an appeal from a lower court unless:

(a) A state statute *per se* was specifically addressed by the reviewing court, and

(b) The statute, unquestionably, was held as unconstitutional.

In our case, the constitutionality of the Florida long-arm statute was neither examined by the Circuit Court, nor found to be "repugnant to the Constitution." The Cir-

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48 *Kulko v. Superior Court of California,* 436 U.S. 84, 92 n.4 (1978).

cuit Court "... merely applied the law of the state ..."[49] to the facts of the particular circumstances and found that the Florida long-arm statute was inapplicable in this particular situation since to apply it, under the unique set of circumstances presented here, would offend fundamental fairness.

6.1.6. Two-Prong Test Required

In its briefing, Burger King has chosen to ignore the traditional two-prong test which may permit the exercise of *in personam* jurisdiction in a federal trial court.

For a United States district court to assert jurisdiction under any state long-arm statute, there must be a two-prong test, with each prong independently applied. This test was recently reiterated in *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*[50] The test asks both:

(a) Whether the non-resident defendant falls within the literal grasp of Florida's long-arm statute?[51] And, if so ...

(b) Whether the non-resident defendant has some "minimum contacts" in Florida?[52]

Given the first prong of the test, Rudzewicz may well have fallen within the literal wording of the state's long-

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49 *Baxter v. Continental Casualty Co.*, 234 U.S. 578, 579 (1931).

50 700 F.2d 1026, 1028 (5th Cir. 1983); *cert. denied*, — U.S. —, 104 S.Ct. 2180 (1984).

51 *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

52 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982).

arm statute: he failed to do an act, required by the contract to be done, in Florida. Yet, on the second prong of the test, the Circuit Court held that Rudzewicz, as an individual, lacked the constitutionally-requisite "minimum contacts" in Florida.[53]

Thus, the issue raised by Burger King here is this: can a statute be constitutional as written, yet, have an unconstitutional effect in its operation on a particular defendant? Certainly!

The operation of statutory language (which is otherwise constitutional) may deprive an individual of "due process" in some circumstances and, consequently, such operation would be fundamentally unfair.

The Circuit Court had absolutely nothing to say about the constitutionality of the Florida long-arm statute *per se*. In reversing, however, the Circuit Court did hold that—in this instance, when that statutory language is applied here to Rudzewicz—it violates his individual "due process" rights.

6.1.7. Statute Could be Constitutional

This Florida long-arm statute vests *in personam* jurisdiction where the non-resident defendant fails to do an act, required to have been done, in Florida. Such a long-arm statute might be considered constitutional on its face and when applied to certain facts.

Assuming there are "minimum contacts," one can imagine certain acts which, if not done in Florida, might well permit *in personam* jurisdiction under that long-arm stat-

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53 *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

ute. Personal jurisdiction could be obtained under Florida's long-arm statute where, under the terms of a contract, a non-resident defendant fails:

(a) To come to Florida to provide prepaid services as contracted.[54]

(b) To honor a guarantee of a Florida contract, upon which others have relied to their detriment.[55]

Arguably, however, one could challenge the "undone acts" provision of the Florida long-arm statute as providing inadequate notice and being unconstitutionally vague. Yet, since the Circuit Court never reached that issue, neither will we debate it here.

6.1.8. Federal Courts Must Inquire

The reach of a long-arm statute is a question of state law. As a general rule, federal courts must accept the interpretation given a long-arm statute by a state's supreme court; however, the Florida Supreme Court has never ruled on Section 48.193(1)(g), Fla. Stat. (1983).

However, the application, to an individual, of a state's long-arm statute, indeed, is limited by constitutional "due process" considerations. The degree of limitation is a question of federal law. Determining whether a state's long-arm statute should otherwise limit a federal court's personal jurisdiction calls for an inquiry.

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54 *Lacy v. Force V Corp.*, 403 So.2d 1050 (Fla. 1st D.C.A. 1981).

55 *Horace v. American National Bank and Trust Co.*, 251 So.2d 33 (Fla. D.C.A. 1971).

Even Florida's Third District Court of Appeals agreed that an independent inquiry is required when dealing with this particular long-arm statute:

> Federal court review of Section 48.193(1)(g), alone, as a sole basis for jurisdiction over a non-resident has been limited but . . . *constitutional requirements are not met by relying solely on Section 48.193(1)(g), Florida Statutes* [emphasis added].[56]

Here, Defendant Rudzewicz may well have met the literal requirements of the Florida long-arm statute; however, for *in personam* jurisdiction to vest in a U.S. district court, there must be some "minimum contacts" in Florida, as well, to satisfy federal "due process" requirements. Rudzewicz had no contacts, to speak of, in Florida.

Thus, since both tests must be met, and because Rudzewicz lacked "minimum contacts," the federal trial court could have no personal jurisdiction over him, despite the literal language of that statute.

As the Circuit Court did here, federal courts not only are permitted, but are mandated, to constrain the reach of a state's long-arm statute when constitutional "due process" dictates.[57]

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56 *Engineered Storage v. National Partition*, 415 So.2d 114, 115 n.3 (Fla. 3d D.C.A. 1982). *See also Scordilis v. Drobnicki*, 443 So.2d 411, 412-414 (Fla. 4th D.C.A. 1984); *Poston v. American President Lines, Ltd.*, 452 F.Supp. 568 (S.D.Fla. 1978); *Lakewood Pipe*, 379 So.2d 475 (Fla. 2d D.C.A. 1979), *appeal dismissed*, 383 So.2d 120 (Fla. 1980); *Osborn v. University Society, Inc.*, 378 So.2d 873 (Fla. 2d D.C.A. 1979).

57 *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982).

Here, in constraining Florida's otherwise unfettered long-arm statute, the 11th Circuit found that Rudzewicz may have fallen within the reach of that long-arm statute, if literally construed; yet, it also held that statute, if personally applied to Rudzewicz (who is independently protected as a citizen of the United States by the federal Constitution), " . . . would offend the fundamental fairness which is the touchstone of due process" (J.A. 182-183).

In the end, the Circuit Court did not effect the constitutionality of the Florida long-arm statute, nor did it question its validity as being repugnant to the Constitution; it did hold, however, that under these particular circumstances, and as applied only to Rudzewicz, forcing him to defend against Burger King in Florida (rather than in Michigan) would violate his individual right to "due process."

6.1.9. Florida Supreme Court Never Ruled

As a general rule, this Court will not grant a petition for *certiorari* where the state's court of last resort has never ruled on a specific matter.[58]

The Florida Supreme Court has never ruled on the constitutionality of Subsection (g) of Section 48.193(1), Fla. Stat. (1983).[59]

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58 Rules of the Supreme Court, 17.1(a); see also, *Silkwood, supra; Kulko, supra; Perry Education Ass'n v. Perry Local Edudations' Ass'n*, 103 S.Ct. 948 (1983); *Wilson v. Cook*, 327 U.S. 474 (1946).

59 The Florida Supreme Court did rule on Subsection (b) of Section 48.193(1) in *Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So.2d 1305 (Fla. 1981). Quite differently than this case, the court only addressed the tort claim (effected by 48.193(1) (b), Fla. Stat.), and not the contract claim (effected by 48.193(1) (g), Fla. Stat.).

Therefore, this is not a case where ". . . a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort. . . ."[60] Consequently, Burger King's petition for *certiorari* should be denied, in this respect.

6.1.10. Conclusion

The Circuit Court held that by operation—not by construction—this Florida statute could not be constitutionally employed to obtain *in personam* jurisdiction over Rudzewicz by the federal district court.

Therefore, since the constitutionality of the Florida long-arm statute was never at issue, one way or the other, Burger King has no appeal.

Furthermore, since no federal question is in issue, Petitioner's improvident appeal should not be treated as a Petition for Writ of Certiorari.

6.2. No "Minimum Contacts"

Failure to Mail Checks
Standing Alone
Establishes no "Minimum Contact"

Rudzewicz's failure to mail checks to Florida, standing alone, does not establish the constitutionally-required "minimum contacts" to confer in personam jurisdiction.

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60 Rules of the Supreme Court, 17.1(a).

This Court has promulgated an expansive body of law on "minimum contacts" over the past 106 years.[61]

Moreover, since 1974, a total of five circuit courts have ruled on the same matter now before this Court. Not surprisingly, there is unanimity—and no conflict—on this personal jurisdiction issue among the 5th, 6th, 7th, 8th, and 11th Circuits.

6.2.1. "Visiting State" not Enough

In *Hydrokinetics, supra,* the complaint, filed in Texas against a non-resident Alaska buyer, was dismissed. The Alaska firm merely purchased equipment from a Texas firm to be shipped out to the Klondike.

Personal jurisdiction was unwarranted because the Alaska firm did not purposefully avail itself of the privilege of conducting business within Texas or invoke the benefits and protections of Texas law. While contract negotiations were conducted by telex, telephone, and letter, two officers of the non-resident buyer visited the forum state to inspect the equipment and facilities.

The trial court properly dismissed the complaint and concluded that "the Defendant never made any calculated effort to engage in or solicit business in Texas with a Texas company nor had any expectation of extracting profits."[62]

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61 *Pennoyer v. Neff*, 95 U.S. 714 (1878); *International Shoe Co. v. Washington, supra; McGee v. International Life Ins. Co., supra; Hanson v. Denckla*, 357 U.S. 235 (1958); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Kulko v. Superior Court of California, supra; World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

62 *Hydrokinetics, Inc. v. Alaska Mechanical, Inc., supra* at 1027-1028.

6.2.2. "Obligation to Pay" not Enough

In *Scullin Steel, supra,* the 8th Circuit held that the "obligation" to make payments was not enough for a forum state (Missouri) to obtain personal jurisdiction over a non-resident defendant (in Pennsylvania):

> [T]he use of interstate facilities (telephone, the mail) [and] the making of payments in the forum state . . . are secondary or ancillary factors and cannot alone provide the "minimum contacts" required by due process. *See . . . Aaron Ferer & Sons Co. v. Atlas Scrap Iron & Metal Co.*, 558 F.2d at 453 (use of facilities of interstate commerce); *McQuay, Inc. v. Samuel Schlosberg, Inc.*, 321 F.2d 902, 905-06 (D.Minn. 1971) (payment within forum).[63]

6.2.3. "Two Years of Rent" not Enough

In *Telco Leasing, Inc. v. Marshall County Hospital,*[64] an Illinois lessor, attempted to obtain personal jurisdiction over a non-resident lessee by claiming that "minimum contacts" were established because the non-resident:

(a) Delivered rent payments for two years to the forum state; and,

(b) Signed a lease (outside the forum state) which was to have been binding " . . . when accepted by Lessor in the State of Illinois . . .;" and,

(c) Communicated in writing and by telephone to Plaintiff's office in the forum state.

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63 *Scullin Steel Co., supra* at 314.

64 586 F.2d 49 (7th Cir. 1973).

The trial court dismissed the complaint for lack of personal jurisdiction, proclaiming that:

> Whether or not there are sufficient minimum contacts to comport with due process cannot be determined by any set formula or rule of thumb, but must rest on a consideration of what is fair and reasonable in the circumstances of each particular case.[65]

Employing a "totality of the circumstances" test, the 7th Circuit held there was no personal jurisdiction over the non-resident defendant because:

> . . . it is not the terms of the lease that are controlling, but all the facts and circumstances of the transaction, for it is from the total picture that we determine whether or not the exertion of jurisdiction would comport with the notions of fair play and substantial justice.[66]

6.2.4. "Mail and Phone" not Enough

In *Weller v. Cromwell Oil Co.*,[67] California-based, non-resident defendants telephoned and sent mail to the forum state, Ohio.

The 6th Circuit asserted no jurisdiction over these Californians who were served with process in California; were never in Ohio to commit any act or omission, either personally or by any agent; never negotiated this contract in Ohio; and, made all telephone calls, and mailed all correspondence, from California.

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65 *Id.* at 50 citing *Hutter Northern Trust v. Door County Chamber of Commerce*, 403 F.2d 481 (7th Cir. 1968).

66 *Id.* at 52.

67 504 F.2d 927 (6th Cir. 1974).

The court held that mere contacts by mail or telephone do not confer personal jurisdiction upon a non-resident under the "transacting business" clause of a state's long-arm statute.

6.2.5. "Contractual Obligation Alone" not Enough

There is some Florida Appellate law that a contractual obligation standing alone, which requires payment to be made to a creditor in Florida, was not enough to meet the "minimum contacts" standard.[68]

The Florida Supreme Court has considered circumstances where there were no "continuous and systematic activities" with the forum state. In citing *International Shoe*, the Florida Supreme Court has reasoned that:

> Due Process does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contact, ties, or relations.[69]

The Florida state appeal court concurs with the constitutional "minimum contacts" test:

> [U]nder a given factual situation, even though a non-resident may appear to fall within wording of the long-arm statute, a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts with the forum state.[70]

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68 *Lakewood Pipe of Texas, Inc. v. Rubaii, supra; Oriental Imports and Exports, Inc. v. Maduro & Curiel's Bank, N.V.*, 701 F.2d 889 (11th Cir. 1983).

69 *Ford Motor Company v. Atwood Vacuum Machine Co., supra*, at 1310.

70 *Osborn v. University Society, Inc., supra* at 877.

In further elaboration, a Florida appeals court (1st D.C.A.) determined:

> Unquestionably the single most important factor to be considered is whether "the defendant's conduct and connections with the forum . . . are such that he should reasonably anticipate being hailed into court there . . ." *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 297. *It is essential that this circumstance be considered from the perspective of the defendant—not from that of the plaintiff* [emphasis added].[71]

6.2.6. Conclusion

There is unanimity among the federal circuits on this matter and, as well, there is some Florida appellate law to support this premise: the "obligation" to make payments, standing alone, does not provide constitutionally-requisite "minimum contacts" to support *in personam* jurisdiction over a non-resident defendant.

7. CONCLUSION

It is clear from the record below, as well as the Eleventh Circuit's decision, that:

A. Section 48.193(1)(g) of the Florida "long arm" statute was never held "unconstitutional."

B. The Eleventh Circuit Court of Appeals ruled that, while Rudzewicz may have fallen within the literal grasp of Florida's long-arm statute, its application to him as an individual, under these circumstances, violated his constitutional right to "due process."

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71 *Lacy v. Force V Corporation, supra* at 1054.

While this Court could grant Burger King's petition for *certiorari*, it is manifest that this Court has no jurisdiction since no Florida statute was declared unconstitutional.

As relief, we pray that this Court dismiss the appeal and deny Burger King's alternatively-argued petition for *certiorari*.

Respectfully submitted,

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No. 83-2097

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURGER KING CORPORATION, a
Florida Corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

REPLY BRIEF OF APPELLANT

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No. 83-2097

In the Supreme Court of the United States

OCTOBER TERM, 1984

BURGER KING CORPORATION, a
Florida Corporation,
Appellant,

vs.

JOHN RUDZEWICZ,
Appellee.

On Appeal From the United States Court
of Appeals, Eleventh Circuit

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

The Appellee's Brief is largely unresponsive to the arguments and authorities offered in the Brief of Appellant—and we will not burden the Court by repeating unanswered points; dismissing irrelevancies, false starts and non sequiturs; or listing the many factual assertions offered without citation to the Record. Instead, we hope to focus again upon our central thesis, and the evidence and authorities supporting it.

In that context, we disagree strongly with the appellee's assertion (brief at 8-11) that the franchisees' relationship with Burger King was confined to their dealings with the Michigan regional office.[1] Although Mr. Rudzewicz

1. Burger King Corporation is a wholly-owned subsidiary of the Pillsbury Company.

quotes extensively from the circuit court's opinion on this point, he offers almost no evidentiary support in the Record. He claims that *only* the Michigan office "supervised" the franchise (brief at 8), but cites for this strong proposition only a set of letters proving that before the franchisees signed on with Burger King, the Michigan office had hired a Detroit real estate broker to sell the property (X. P; Tr. 343-44, 600)—an unremarkable event; and in addition his own angry letter to the regional office, threatening not to open the store unless he received certain information (X. T.; Tr. 354, 362). Of course, neither exhibit proves the point.[2]

To the contrary, as we observed (brief at 13 n.11, 19), there was a parallel course of direct contact between the franchisees and the Miami headquarters, relating to the critical policy differences which became the subject matter of the eventual litigation. We noted the evidence that the regional office performed only ministerial functions, and that the franchisees knew it (Brief of Appellant at 13 n. 11).[3] It was the Miami headquarters which made the key negotiating decisions, and which took over direct control when the franchisees breached the contract.

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2. In addition, Mr. Rudzewicz points out correctly that his first discussions about owning the franchise took place in Michigan; that his co-franchisee Brian MacShara actually met with Burger King's people only in Michigan (Tr. 506); that the prospective franchisees were interviewed in Michigan; that they signed all documents in Michigan; that Burger King was registered with the State of Michigan; that Mr. Rudzewicz never physically traveled to Florida; and of course that the restaurant was operated in Michigan (brief at 9-11). None of these observations, however, establishes the circuit court's conclusion that the franchisees dealt *only* with the Michigan office.

3. Mr. Rudzewicz himself quotes in his brief (p. 12) the circuit court's acknowledgement that the Michigan office was powerless to alter the amount of rent (J.A. 169-70).

Moreover, it was the Miami headquarters which defined the inherent nature of this franchise, through the four key documents which were created in Miami and sent directly to the franchisees from Miami, discussed in our initial brief at 4-12. As we noted, these documents not only establish a long-term interdependent relationship, and reveal *that relationship* (as opposed, for example, to the mere provision of goods) to be the principal object of the contract, but also identify the Miami headquarters as the focal point of that relationship—its creator, enforcer, and arbiter. They regulate the finest details of the franchise, from packaging to menus, uniforms, signs and equipment (Brief of Appellant at 9). They do so in the recognition that "[u]niformity of service, appearance, and quality of product is essential to the preservation of the Burger King image and the benefits accruing therefrom to both Franchisee and Franchisor" (J.A. 31).[4] They create a substantial enforcement mechanism, in Burger King's right of physical inspection and an accounting (Brief of Appellant at 9-10). And they identify the Miami headquarters as the enforcement authority—the office which receives all notices, computes and receives all payments, and conducts any arbitration—all in the context of agreements which call for the application of Florida law (Brief of Appellant at 10-11 & n.6). As the first offering circular advised the prospective franchisees, "[t]he business activities of Burger King Corporation are conducted by the officers and directors of the corporation all of whom may be contacted at [the Miami address]" (J.A. 11).

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4. As Mr. Rudzewicz himself acknowledges (brief at 6), his desire was not simply to sell hamburgers in Michigan, but to sell "Whoppers." Whoppers are not simply hamburgers. As a product of promotions and services throughout the United States, they are nationally recognized as *Burger King* hamburgers.

Even if the franchisees had dealt personally only with representatives of the Michigan office, these documents alone would have put them on notice that the Michigan people were simply functionaries, and that Miami called the shots. When these documents are coupled with the evidence that the franchisees did indeed deal directly with officials of the Miami office—on the key questions in litigation—that conclusion is unassailable. Having thus reemphasized the character of this franchise relationship, we turn to the legal context in which it must be assessed.[5]

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5. Before doing so, however, we must take issue with four minor misstatements in the Appellee's Brief. First (brief at 5), Mr. Rudzewicz implies that while the lease agreement calls for the payment of rent to Miami, the franchise agreement did not. He ignores substantial evidence to the contrary (Brief of Appellant at 10 & n.6). Second (brief at 5), the appellee finds "no evidence that Rudzewicz ever mailed even one rent check to Florida." That is incorrect; a Burger King witness testified that the franchisees made at least one rental payment (Tr. 91), and of course the rent was required to be sent to Miami (J.A. 113). And despite two reminders (Jurisdictional Statement at 5 n.5; Brief in Opposition to Motion to Affirm Judgment at 4), Mr. Rudzewicz forgets his concession in the circuit court (appellant's brief at 6) that the franchisees in fact made "one or two of their rent payments for Store #775." Moreover, the franchisees made a number of other payments to Miami (Brief of Appellant at 19).

Third (brief at 7), Mr. Rudzewicz asserts with no supporting authority that he did no accounting work for the three Burger King franchises represented by his firm; but the transcript discloses only that the firm had the account—and not whether Mr. Rudzewicz worked on it (Tr. 425). Fourth (brief at 13), Mr. Rudzewicz asserts that his payments for purchases from Burger King's Distron and Davmor divisions were made to Burger King's regional office, citing only one document which proves the point for Distron. As we noted (brief at 15, 19), the Davmor division was located in Miami, billed the franchisees from Miami, and received their payments in Miami.

Finally, we must acknowledge that Mr. Rudzewicz is right to point out (brief at 10) that co-franchisee MacShara was not a member of the partnership (R.M.B.K.-2) which Mr. Rudzewicz formed for the purpose of leasing store equipment. *See* Tr. 438. Nevertheless, we stand by our contention (brief at 16 n.14, 36) that Mr. MacShara and Mr. Rudzewicz were partners in the franchise, and for that reason and others that Mr. MacShara's training in Miami is relevant to the trial court's exercise of jurisdiction over Mr. Rudzewicz.

ARGUMENT

I. This Court Has Jurisdiction Under 28 U.S.C. §1254(2) Because the Circuit Court Held That §48.193(1)(g) of the Florida Statutes—Which Confers Long-Arm Jurisdiction Upon One Who Breaches a Contract in Florida by Failing to Perform Acts Required by the Contract to Be Performed in Florida—Is Unconstitutional As Applied.

No less than five times in his brief, Mr. Rudzewicz concedes our point: "The Eleventh Circuit Court of Appeals ruled that, while Rudzewicz may have fallen within the literal grasp of Florida's long-arm statute, its application to him as an individual, under these circumstances, violated his constitutional right to due process."[6] As we consistently have emphasized (Jurisdictional Statement at 11 n.16; Brief of Appellant at 26), this Court has jurisdiction under 28 U.S.C. §1254(2) whenever a state statute has been declared unconstitutional as applied. Thus, Mr. Rudzewicz has conceded this Court's jurisdiction by direct appeal.

That concession is appropriate both because of the circuit court's disposition of this case, and because of the posture in which the case reached the circuit court. By its plain language, Section 1254(2) focuses on the disposition effected by the circuit court, allowing a direct appeal whenever a state statute has been "held by a court of ap-

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6. Appellee's Brief at 42; *see id.* at 1, 32-33, 35, 36; *see also id.* at 31, 32. Mr. Rudzewicz' point seems to be that the circuit court did not declare the statute facially invalid: "This appeal should be dismissed if this Court finds that the constitutionality of the Florida long-arm statute *per se* was not at issue, below" (brief at 1-2).

peals to be invalid . . . ."[7] Thus, if the circuit court's opinion is fairly read to have declared the Florida statute unconstitutional as applied, that outcome satisfies the statutory criteria for jurisdiction, even if the circuit court might reasonably have undertaken a saving construction—but chose not to do so.

We submit that the circuit court's opinion necessarily declares the Florida long-arm statute unconstitutional as applied. As we noted (brief at 26 & n.27), that conclusion does not depend upon the circuit court's willingness to acknowledge its holding, but on the holding itself.[8] As we

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7. Mr. Rudzewicz himself cites the decisions in *Colorado Central Consolidated Mining Co. v. Turck,* 150 U.S. 25, 36 (1893) and *Durousseau v. United States,* 10 U.S. (6 Cranch) 307 (1810), both confirming that the Court's appellate jurisdiction is defined by the statutory language. This observation is consistent with the principle noted in the initial brief (p. 25 n.25), that the statute will confer jurisdiction by virtue of the circuit court's disposition of the case, even if the constitutional question was neither raised by the appellee below nor ruled upon by the trial court. *See Jenkins v. Georgia,* 418 U.S. 153, 157 (1974), *citing Raley v. Ohio,* 360 U.S. 423, 436 (1959). Mr. Rudzewicz is correct (brief at 28, 30 n.6) that the decision in *Kulko v. Superior Court of California in and for the City and County of San Francisco,* 436 U.S. 84, 90 n.4 (1978) (hereinafter *"Kulko"*), does observe that the appellant had not challenged the constitutionality of the state statute below; but this observation is offered only as an aid to interpreting the decision under review. In light of the statute's language, the authorities cited above, and common sense, there can be no question that a finding of unconstitutionality is reviewable by direct appeal, even if offered by the circuit court on its own motion. In this case, as we argued (brief at 25 n.25), Mr. Rudzewicz' trial motion was generally sufficient to place the constitutionality of the statute at issue.

8. *Franchise Tax Board of California v. United States Postal Service,* ..... U.S. ....., 104 S. Ct. ....., 81 L. Ed.2d 446, 450 n.7 (1984) (and cases cited); *California v. Grace Brethren Church,* 457 U.S. 393, 405 (1982) (and cases cited). This point is not undermined by the Court's observation—in two cases upon which Mr. Rudzewicz relies (brief at 28, 31)—that the "opinion below does not purport to determine the constitutionality of the . . .

(Continued on following page)

argued (brief at 25-26), the circuit court's opinion begins by acknowledging Mr. Rudzewicz' concession "that his activities fall within the reach of the Florida long-arm statute . . ." (J.A. 171). Rather than revisiting that assumption, the circuit court addresses Mr. Rudzewicz' contention "that invocation of that statute under these circumstances exceeds the bounds of due process" (J.A. 172), and concludes that "[j]urisdiction under these circumstances would offend the fundamental fairness which is the touchstone of due process" (J.A. 183). Thus, whether or not the circuit court might have rejected the parties' concession that the long-arm statute does confer jurisdiction in this case, the fact is that the circuit court chose not to do so, accepting instead the issue framed by the parties, and ruling for Mr. Rudzewicz only in that context. Since section 1254(2) defines this Court's jurisdiction solely according to the circuit court's holding, that disposition necessarily created a right of direct appeal.

Finally (brief at 23-24), we argued that given its substantive conclusions, no other disposition was even available to the circuit court. Put otherwise, the parties' concession in the circuit court was appropriate, because the long-arm statute does clearly apply to the facts of this case. Mr. Rudzewicz is correct that Florida's Supreme Court has not

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Footnote continued—

jurisdictional statute." *Calder v. Jones,* ..... U.S. ....., 104 S. Ct. 1482, 79 L. Ed.2d 804, 811 n.7 (1984) (hereinafter *"Calder"*); *Kulko,* 436 U.S. at 90 n.4. In both cases a holding of unconstitutionality was not inherent in the opinion below—not simply because that opinion was ambiguous, but also because the jurisdictional statute in question was expressly drawn to be consistent with constitutional limits. In this case, as we note below, the language of the state statute does not permit an analogous construction; and in any event the circuit court's opinion is not ambiguous, but necessarily declares the statute unconstitutional as applied.

addressed the question (brief at 34, 36), but he does not deny that all five of Florida's appellate districts have construed the statute according to its plain language, and that the handful of contrary decisions make no sense (Brief of Appellant at 24 n.24). As we noted in the Jurisdictional Statement (p. 9 & n.9), Florida law requires a strict construction of jurisdictional statutes, and the plain language of this statute confers jurisdiction whenever a party assertedly has failed to perform acts required by the contract to be performed in Florida. Mr. Rudzewicz says nothing to deny that point, or the more-important point that even if an option of statutory construction had been available to the circuit court, the circuit court eschewed that option, accepted the parties' construction of the statute, and held it unconstitutional as applied.

II. The Circuit Court Erred in Holding the Statute Unconstitutional As Applied, Because Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum; Was Called to Answer in a Florida Court for Conduct Growing Out of That Relationship; and Was Not Unfairly Burdened by the Defense.

1. *Mr. Rudzewicz Purposefully Availed Himself of the Benefits and Protection of the Forum* (Brief of Appellant at 27-39). Our central thesis, almost entirely ignored in the Appellee's Brief, is that Mr. Rudzewicz voluntarily and purposefully created a long-term interdependent business relationship with the Burger King headquarters in Miami. In the language of the *Kulko* decision, 436 U.S. at 97, 100, 101, he "sought a commercial benefit from solicitation of business from a resident of [the forum]," derived a "personal or commercial benefit" from the contract, and displayed an "intent to obtain or expectancy of receiving a

corresponding benefit in the State . . . ."[9] We spent a good deal of space on this important point, establishing that the franchisees purposefully sought the benefits and security of an established national organization; contracted to conform their conduct to a set of meticulous national standards established and enforced in Miami; contracted three times for the application of Florida law; contracted to arbitrate if necessary in Miami; entered into agreements which clearly identified the Miami headquarters as the source of policy; engaged in a course of conduct which validated that impression; and knowingly caused economic injury in Florida. Ignoring almost all of this, Mr. Rudzewicz offers three responses.

First (Appellee's Brief at 6, 8-11), as we have noted, Mr. Rudzewicz suggests that the franchisees dealt entirely with the Michigan regional office, which for all appearances was the sole embodiment of Burger King. Almost our entire initial brief proves otherwise, and we have said already all that we can say to establish that the overwhelming evidence of record, taken in the light most favorable to the trial court's exercise of jurisdiction, demonstrates that the franchisees knowingly created a long-term relationship with Burger King's headquarters in Miami.

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9. Thus the question is not, as Mr. Rudzewicz suggests (brief at 14), whether the State of Florida conferred some tangible benefit upon him—for example the benefit of strict regulation of franchises. In the language of *Kulko*, the question is whether Mr. Rudzewicz "sought a commercial benefit from solicitation of business from a resident of [the forum]"—and not from the forum itself. By the same token, the question is not, as Mr. Rudzewicz suggests (brief at 14), whether his activities had the effect of conferring some benefit on another forum—for example by his payment of taxes and wages in Michigan. As we acknowledged (brief at 43 n.62), this case could have been brought in Michigan, and Michigan clearly has an interest in the outcome. While that interest might have supported a motion for change of venue, a point Mr. Rudzewicz has abandoned, it is not sufficient to divest the Florida court of jurisdiction if minimal constitutional requirements are satisfied.

Second (brief at 8, 12, 14-18), Mr. Rudzewicz insists that Michigan law—specifically the Michigan Franchise Investment Act (Mich. Comp. Laws Ann. §445.1501, *et seq.* (Supp. 1983-84))—and not Florida law—applies to this case. Since this is the major substantive argument advanced in the Appellee's Brief, we will consider it at some length, though mindful of the Court's repeated emphasis that the substantive choice-of-law question is not the same as the jurisdictional question (Jurisdictional Statement at 21-22; Brief of Appellant at 33 & n.43). It is relevant in this case primarily because of the franchisees' voluntary acceptance of three separate contracts calling for the application of Florida law. At the least, this acceptance put the franchisees on notice that Florida had an interest in the case, and that they might be called to answer for any breach of contract in a Florida court. Beyond that, in the context of the entire relationship, these choice-of-law provisions are a prominent acknowledgement of the importance to both parties of Burger King's regulatory responsibilities —and the institutional arrangement which that required.[10] In this light, Mr. Rudzewicz' repeated invocation of the Michigan statute is irrelevant, because the contracts in this case say nothing about that statute. What matters is that the contracts call for the application of Florida law, and that put the franchisees on notice.

Moreover, we disagree that the Michigan statute applies in this case, because Mr. Rudzewicz offers no reason for excusing his contractual obligation to comply with Florida law. This is a point which we briefed at some length in the circuit court (Brief of Appellee at 43-47),

10. In contrast, as we acknowledged (Jurisdictional Statement at 22), neither point would follow in the absence of a *contractual* choice-of-law provision, even if the standard choice-of-law analysis would call for the application of Florida law (which it does, Jurisdictional Statement at 22 n.31).

establishing that the Florida courts would honor the parties' choice of law in this case, in light of the substantial relationship between this transaction and Florida, and the absence of any conflict between the application of Florida law and the fundamental policy of another interested jurisdiction.[11] Thus, Mr. Rudzewicz has invoked the Michigan statute without demonstrating its applicability, in the face of his contractual choice of Florida law.

Finally on this point, we submit that even if the Michigan statute were applicable, that would not forestall the enforcement of Florida law on other issues. Contrary to Mr. Rudzewicz' assertion that the Michigan statute is "comprehensive" and "systematic" (brief at 15), it is neither. It purports to regulate not the conduct of a franchise but only "the offer, sale, and purchase of franchisees . . .";[12] it prohibits certain practices only "in connection with the offer, sale, or purchase of any franchise," Mich.

11. *See Morgan Walton Properties, Inc. v. International City Bank & Trust Co.*, 404 So.2d 1059, 1063 (Fla. 1981), *citing Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So.2d 507, 509, 512-13 (Fla. 1981). See also the cases and authorities cited at p. 45 n.54 of the Brief of Appellee in the circuit court. Of course, as the forum, it is Florida's choice-of-law rule which governs this question, *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941), and in any event Mr. Rudzewicz has offered no demonstration that the substantive choice-of-law outcome would be any different in Michigan. And if it would be different, as we argued (Brief of Appellant at p. 43 n.64), that would only intensify Florida's interest in the administration of its own law: "In cases of true conflict—that is to say, situations in which more than one legal order is concerned with the controversy and the relevant policies of each differ so fundamentally that a mutually acceptable accommodation is impossible—a potential forum may well find a strong argument for taking jurisdiction in its preference for its own law and in its awareness that another jurisdiction's choice-of-law rules would point elsewhere." von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1130 (1966).

12. Preamble to act, 24 Mich. Comp. Laws Ann. (Supp. 1983-84, at p. 114).

Comp. Laws Ann. §445.1505 (Supp. 1983-84); and it provides that "[n]othing in this act shall limit a liability which may exist by virtue of any other statute or under common law if this act were not in effect," *id.*, §445.1534.[13]

Mr. Rudzewicz did not assert the applicability of Michigan law in his answer to Burger King's complaint (J.A. 140-46)—thus conceding the applicability of the forum's law, and waiving forever any contrary contention;[14] he invoked Michigan law only in support of his counterclaim against Burger King (J.A. 146-50). In this context, and given the limited reach of the act, its recognition would still leave substantial room for the application of Florida law on other issues. For all of these reasons, Mr. Rudzewicz' invocation of the Michigan act is not a significant factor in the jurisdictional equation.[15]

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13. It was only in this context that various Burger King officials acknowledged at trial that Burger King is subject to the Michigan act's requirements regarding information provided to prospective franchisees (*see* Appellee's Brief at 16-17). That is a condition of doing business in Michigan, but it does nothing to forestall enforcement of a contractual choice-of-law provision in any litigation between the parties after the franchise is formed.

14. *See Clarkson Co., Ltd. v. Shaheen*, 660 F.2d 506, 512 n.4 (2nd Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 296 n.7 (7th Cir. 1974); *Joseph E. Bennett Co. v. Trio Industries, Inc.*, 306 F.2d 546, 549 (1st Cir. 1962); *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537, 544 n.5 (2nd Cir. 1962). *See generally* 1A *Moore's Federal Practice, Part II*, §0.316[4] (1983). Florida follows this rule. *See Proprietors Ins. Co. v. Valsecchi*, 435 So.2d 290, 295 n.5 (Fla. 3rd DCA 1983), *review denied*, 449 So.2d 265 (Fla. 1984).

15. Mr. Rudzewicz's brief (pp. 17-18) also offers the gratuitous assertion that Burger King violated the Michigan act, for the sole reason that it assertedly failed to provide the franchisees with a copy of all proposed agreements at least 7 days before execution of any binding franchise agreement, or 7 days before the payment of any consideration, whichever comes first. Of course this has nothing to do with the jurisdictional question, but we cannot leave the accusation unanswered. The district

(Continued on following page)

Third and finally (brief at 38-41), Mr. Rudzewicz chooses to forego any discussion of this Court's decisions on the question of personal jurisdiction, in favor of four circuit court opinions—first offered to him in our Jurisdictional Statement as evidence of disagreement among the circuits (p. 28 n.48)—in support of the incredible proposition that "there is unanimity—and no conflict—on this personal jurisdiction issue among the [circuits represented in these opinions]" (Appellee's Brief at 38). Of course that pronouncement ignores the dozens of lower court decisions supportive of Burger King's position cited in the Jurisdictional Statement (p. 18 n.27, p. 19 n.28) and in the Brief of Appellant (p. 47 n.75).

Moreover, these four cases are readily distinguishable from this one. None involves the intimate interaction of the franchise and license relationship present here. Three originate in isolated purchases or leases of equipment, with no continuing involvement among the parties;[16] and the fourth[17] focuses not upon the more stable distributor rela-

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Footnote continued—

court found that the prospective franchisees were given copies of the lease and franchise agreements over four months before they were signed, and that Burger King did not violate the Michigan act or any other laws of Michigan, assuming *arguendo* that such laws applied (J.A. 158-59). The arguments and citations supporting that conclusion are found in the Brief of Appellee in the circuit court at pp. 6-12.

16. *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026 (5th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S. Ct. 2180 (1984); *Scullin Steel Co. v. National Railway Utilization Corp.*, 676 F.2d 309 (8th Cir. 1982); *Telco Leasing, Inc. v. Marshall County Hospital*, 586 F.2d 49 (7th Cir. 1978) (per curiam). For example, as we pointed out in our Brief in Opposition to Motion to Affirm Judgment (p. 5 n.6), *Hydrokinetics* involved "only a single transaction . . . governed by Alaska law, which is the defendant's sole contact with the forum state [Texas]." 700 F.2d at 1029. Here we have an ongoing business relationship, governed by the law of the forum.

17. *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974).

tionship at issue, but solely upon the plaintiff's inability to show that the jurisdictional contacts were those of the individual defendants rather than their corporation, whose amenability to the court's jurisdiction was not contested. This decision only illustrates our point that every case must rest on its own facts (Brief of Appellant at 46 n.74), guided by the principles and refinements articulated by this Court. One could find support for any conclusion in the disparate lower court decisions, and we have certainly collected a majority for our position. We ask the Court to recognize the peculiar nature of this franchise relationship, and the extent to which the franchisees bargained not simply for the arms-length transmission of goods, but for the full range of benefits inherent in their participation in an interstate system.

2. *Burger King's Cause of Action Arose Out of Mr. Rudzewicz' Contacts With the Forum* (Brief of Appellant at 39-40). Mr. Rudzewicz offers no response to this contention.

3. *The Florida Court's Assertion of Jurisdiction Over Mr. Rudzewicz Was Not Otherwise Unfair.* Mr. Rudzewicz does not rebut the central observation on this point—that this Court has never undertaken to balance the various factors relevant to jurisdiction; to the contrary, its decisions suggest that where the defendant is found to have purposefully availed himself of the benefits and protection of the forum, it is appropriate to conclude that he voluntarily incurred any burdens attending the litigation. Nevertheless, we undertook such a balancing of interests (brief at 41-47), concluding that Florida has a clear interest in protecting the business expectations and reputation of its residents; that Florida has an interest in the application of its own law; that Burger King has an interest in litigating

in a convenient forum, and in assuring some uniformity of decisionmaking across its nationwide franchising operation; that Mr. Rudzewicz was not significantly burdened by defending in the Florida court; and that reversal of the circuit court's decision will not create the potential for unfairness in other cases. Of these five points, Mr. Rudzewicz addresses only the latter two.

First (Appellee's Brief at 18), in the least defensible of many indefensible assertions in his brief, Mr. Rudzewicz claims that "Burger King admitted, at trial, that it was burdensome for Rudzewicz to defend himself in Florida because many witnesses from its own Michigan regional headquarters, and others, would have to be brought to Miami at great expense to Rudzewicz (Tr. 574-575)." Neither the citation offered nor any other part of the transcript shows any such admission; and the incident referenced is the one acknowledged in our initial brief (p. 45 n.73)—in which Mr. Rudzewicz was having difficulty authenticating some documents (Tr. 574-75, 579), the trial court offered him as much time as might be necessary to secure the necessary authentication (Tr. 578, 582), and in that light Burger King stipulated to the authenticity of the documents (Tr. 598-99). This example demonstrates that Mr. Rudzewicz was *not* prejudiced by the necessity of litigating in Florida, and no other example is offered. The circuit court's suggestion to the contrary (J.A. 182) is totally unwarranted; there is literally no evidence of record that Mr. Rudzewicz' defense was hindered in any way. The mere inconvenience of traveling to Florida is irrelevant (Brief of Appellant at 45 n.69), and Burger King would be equally inconvenienced if required to litigate in Michigan.

Second (brief at 23-24), Mr. Rudzewicz echoes the circuit court's concern, discussed in the Brief of Appellant at

46, that judicial acknowledgement of jurisdiction in this case might create disturbing implications in other cases. Unlike the circuit court, Mr. Rudzewicz is not concerned with consumer transactions or franchisees owing smaller debts than in this case (J.A. 177, 178, 181). He is concerned that the recognition of jurisdiction in this case—creating a central location for the adjudication of claims arising out of Burger King franchises—might sanction a "car court" in Detroit or a "cola court" in Atlanta.

The short answer is that both examples involve distributorships—not franchises, which embrace a greater measure of interaction and control. This case involves a *franchise*—an arms-length commercial transaction between sophisticated businessmen, based on the premise that it makes good business sense for both parties to have a centralized, regulated operating structure—and by analogy a central forum in which to adjudicate disputes. This kind of relationship is pervasive in our society—reflecting the interdependent nature of our national economy—and there is no reason why a franchisee who solicits and accepts the benefits of such a system should not incur its burdens.

For other kinds of economic relationships, there may be other outcomes. In one sense, automobile or cola distributors are not unlike franchisees, in their reliance upon the good will of national organizations, and to that extent they participate willingly in an interstate network. If a forum clause in such cases would be enforceable (*see* Brief of Appellant at p. 29 n.37)—if the arms-length contractual accession to such jurisdiction violates no public-policy objective—then it seems to us that in proper cases, there is nothing unfair or inappropriate about a manufacturer's desire to adjudicate the terms and conditions of its distributor contracts in a single forum. We do not and need

not extend the arguments advanced here to other forms of business relationships, but we certainly see no frightening scenarios in the prospect. We re-emphasize in closing that every case depends on its own facts. Reversal of the circuit court's opinion will not open the floodgates; it will resolve this single controversy in a manner consistent with constitutional constraints. We submit that this process of balancing interests is not the appropriate perspective, but it supports our position anyway.[18]

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18. We also argued (brief at 47-48) that Mr. Rudzewicz waived his challenge to the district court's jurisdiction. Mr. Rudzewicz does not deny that he compromised and waived his right to appeal the trial court's finding of a trademark infringement (R. 804); that this waived any contention that the trial court lacked personal jurisdiction to adjudicate the trademark claims; and that there is no basis in substance for distinguishing between the propriety of the district court's exercise of jurisdiction over the trademark claims and the propriety of its exercise over the contract claims. Instead (brief at 24 n.35), Mr. Rudzewicz observes correctly that this question of waiver was not presented to the circuit court. However, Rule 34.1(a) of the Rules of the Supreme Court provides that this Court "may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

CONCLUSION

It is respectfully submitted that the decision of the circuit court should be reversed, and the cause remanded with instructions to affirm the district court's judgment.

Respectfully submitted,

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